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United States Court of Appeals

for the Ninth Circuit

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,

Appellant,

vs.

~~AKIRA MORIMOTO,~~ Moriso Nakashima, etc.

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Northern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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426 T. W. Patterson Building,
Fresno 21, California.

In the District Court of the United States in and for the Southern District of California, Northern Division

Civil No. 1028

AKIRA MORIMOTO,

Plaintiff,

vs.

J. HOWARD McGRATH, Attorney General of the United States, as Successor to Alien Property Custodian,

Defendant.

AMENDED COMPLAINT IN SUIT IN EQUITY TO RESTRAIN SALE OF PROPERTY BY OFFICE OF ALIEN PROPERTY

Comes now the plaintiff above named, and for cause of action alleges:

I.

That at all the times herein mentioned, J. Howard McGrath has been, and now is, the duly appointed, qualified and acting Attorney General of the United States and, as such, the successor to the Alien Property Custodian of the United States and the person in charge of the Office of Alien Property for the United States.

II.

That at all the times herein mentioned, Akira Morimoto has been, and now is, a natural-born citizen of the United States, and during all said times has been, and now is, the owner in fee of

those certain lands and premises situate, lying and being in the City of Fresno, County of Fresno, State of California, and bounded and particularly described as follows, to wit:

Lots 10 and 11 in Block 37 of the Town (now City) of Fresno, as per map thereof, recorded June 8, 1876, in Plat, Book 1, Page 2, Fresno County Records.

III.

That Akira Morimoto, prior to the outbreak of the war between Japan and the United States in the year 1941, was living in Japan; that he was, and is, a physician and surgeon, and graduated from a medical school in Tokyo in the year 1938, and was thereupon drafted into the Japanese army where he served as physician and surgeon; that thereafter, and while serving as such draftee, the said Akira Morimoto was taken prisoner and held as a prisoner and removed to Siberia from Manchuria, and remained there until returned to Japan in the month of December, 1948; that during said time, plaintiff contracted diabetes, and on his return to Japan was so ill and in such weakened condition that he was unable to attend to any matter for almost a year; that when he was able to go about, he immediately made application for his passport as an American citizen in order to return to United States, and finally obtained such passport and arrived in the United States late in the month of December, 1950.

IV.

That on or about the month of September, 1949, Izumi Shimizu, brother of plaintiff, learned from an advertisement run in a local paper in Fresno that the above-described property was to be sold by the Alien Property Custodian, and thereupon consulted counsel and learned that a vesting order had been made by the Office of Alien Property in the month of December, 1947, and on or about the 17th of October, 1950, the said Shimizu, acting under a power of attorney which he held from the said plaintiff, made and filed with the Office of Alien Property a notice of claim for return of the property and followed with the filing of the above-entitled action to restrain the sale of said property.

V.

That from the time of the outbreak of said war, there had been no communication between the plaintiff and the said Shimizu, and not until after the return of the plaintiff to Japan in the year 1948 was it known in this country or by the said Shimizu whether the plaintiff was living; that prior to the outbreak of said war, the plaintiff and his family connections had all been living at Hiroshima, Japan, and was thought by the said Shimizu and other persons related to said family residing in the United States that the whole family, including the plaintiff, so residing near Hiroshima had been killed by the bombing of that area; and in fact all of said family residing near Hiroshima at the time of the explosion of the atomic bomb there

were wiped out, and there was no line of communication between the plaintiff and his relatives in California after the bombing of Hiroshima until the plaintiff was able to make his survival known to said persons, about the middle of December, 1948.

VI.

That as heretofore stated, the plaintiff arrived in this country in the month of December, 1950, and ever since said time has been ill and is at present in a hospital for tubercular patients; that he is not now, nor has he ever been, an enemy or an ally of an enemy of the United States, but, on the contrary, has been, and is, a citizen of the United States and the sole and absolute owner of the property now seized and held by the Office of Alien Property as aforesaid.

VII.

That plaintiff, since his return to the United States, has, himself, made out a Notice of Claim for return of property and now files said notice of claim, in duplicate, with the Office of Alien Property, together with a copy of this Amended Complaint.

VIII.

That this Court has jurisdiction of said action for the reason that the plaintiff is a citizen of the United States, and the question of the right of the Office of Alien Property to deal with property is founded upon a question arising under the statutes relating to the Office of Alien Property set out in

Title 50 of the United States Code and Trading With the Enemy Act.

Wherefore, plaintiff prays the judgment and decree of this Court that the property and money of the plaintiff, the title to which was heretofore vested in the Office of Alien Property, be retained in the custody of the Alien Property Custodian or Treasury of the United States as provided in the Trading with the Enemy Act until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyances, transfer, assignment or delivery by the defendant or Treasurer of the United States on order of the Court, or until final judgment or decree shall be entered against claimant, or suit otherwise terminated, and for such other and further order as may be made, as shall appear to the Court to be meet and equitable.

/s/ IRVINE P. ATEN,

/s/ JAMES K. KUBOTA,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed September 28, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS ACTION AS BARRED BY STATUTE OF LIMITATIONS

Defendant moves the court as follows:

To dismiss the action upon the ground that it appears from the face of the summons therein that the action was not instituted within the limitations of time prescribed by section 33 of the Trading With the Enemy Act, as amended (50 U.S.C., App. § 33).

ERNEST A. TOLIN,
CLYDE C. DOWNING,
VALENTINE C. HAMMACK,
PERCY BARSHAY,

By /s/ PERCY BARSHAY,
Attorneys for Defendant.

[Endorsed]: Filed December 5, 1951.

[Title of District Court and Cause.]

MINUTES OF THE COURT

July 1, 1952

Present: The Honorable C. E. Beaumont, District Judge.

Counsel for Plaintiff: No Appearance.

Counsel for Defendant: No Appearance.

Proceedings:

This cause having been heretofore submitted to the Court for a ruling and by the Court taken under advisement,

It Is Now Ordered that motion of defendant to dismiss the action is denied.

EDMUND L. SMITH,
Clerk;

By /s/ E.W.L.,
Deputy Clerk.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant above named and for answer to the amended complaint:

I.

Denies each and every allegation contained in paragraph I of the amended complaint, except admits that at all the times mentioned in the amended complaint subsequent to August 24, 1949, J. Howard McGrath was the duly appointed, qualified and acting Attorney General of the United States and the person in charge of the Office of Alien Property, Department of Justice of the United States.

II.

Denies each and every allegation contained in paragraph II of the amended complaint, except admits that plaintiff was born in the United States and by virtue thereof acquired United States

citizenship; that until the issuance of Vesting Order 10267, issued December 9, 1947, by the Attorney General of the United States, the plaintiff was the owner of those certain lands and premises situate, lying and being in the City of Fresno, County of Fresno, State of California, described in said paragraph II of the said amended complaint, but that by virtue of said vesting order and the provisions of the Trading With the Enemy Act, as amended (50 U.S.C. App. § 1, et seq.), the Attorney General of the United States became the owner of the said lands and premises.

Defendant further alleges that subsequent to the commencement of this action and pursuant to agreement between the plaintiff and the Attorney General of the United States the said lands and premises were sold by the Attorney General of the United States for the sum of $10,000.00, and that by virtue of said agreement the said sum of $10,000.00 became and now is the subject matter of this action in the place and stead of said lands and premises.

III.

Denies any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph III of the amended complaint, except admits that prior to the outbreak of the war between Japan and the United States in the year 1941 plaintiff was living in Japan, that he served in the Japanese Army, that he returned to Japan in December, 1948, that he made an application for a passport as an American

citizen in order to return to the United States, that he obtained such passport, and that he arrived in the United States in December, 1950.

IV.

Denies any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph IV of the amended complaint, except admits that Vesting Order 10267 aforesaid was issued by the Attorney General of the United States on December 9, 1947, vesting the land and premises described in paragraph II of the amended complaint, that on or about October 17, 1950, one Izumi Shimizu, purporting to act on behalf of plaintiff, filed with the Office of Alien Property, Department of Justice, a notice of claim for return of said lands and premises, and that this action was thereafter filed.

V.

Denies any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph V of the amended complaint.

VI.

Denies each and every allegation contained in paragraph VI of the amended complaint, except admits that plaintiff arrived in the United States in December, 1950, and except that defendant denies any knowledge or information sufficient to form a belief as to the truth of the allegation that ever since December, 1950, plaintiff has been ill and was at the date of the filing of the amended complaint in a hospital for tubercular patients, and the alle-

gation that plaintiff is a citizen of the United States.

VII.

Admits the allegations contained in paragraph VII of the amended complaint.

VIII.

Denies each and every allegation contained in paragraph VIII of the amended complaint.

For a First, Separate and Complete Defense to the Action Set Forth in the Amended Complaint Defendant Alleges:

IX.

That this action was commenced after the time limited therefor by the provisions of section 33 of the Trading With the Enemy Act, as amended (50 U.S.C. App. § 33), that by reason thereof the plaintiff may not maintain this action, and that the court is without jurisdiction to entertain and determine the action.

Wherefore defendant demands judgment against plaintiff dismissing the complaint with prejudice and for costs.

WALTER S. BINNS,
CLYDE C. DOWNING,
VALENTINE C. HAMMACK,
PERCY BARSHAY,

By /s/ PERCY BARSHAY,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 12, 1952.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

By Vesting Order No. 10267, December 9, 1947, 12 F.R. 8452, issued pursuant to the provisions of the Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C.A. App. Section 1, et seq., the Attorney General of the United States vested in himself two lots of improved real property in Fresno, California, rights to accrued rentals and rights in the fire insurance policy covering the property. The Order was issued upon a finding that the property was owned by Akira Morimoto, plaintiff herein; and that he was a resident of Japan and a national of Japan, a designated enemy country. This action was commenced on October 23, 1950, and was brought to enjoin the defendant from disposing of the real property by sale. By mutual consent, the real property was thereafter sold by the defendant upon the understanding that the proceeds of the sale amounting to approximately $10,000.00 would stand in lieu of the real property as the subject matter of the action, together with the rentals and proceeds of the fire insurance policy received by the defendant. Following the sale of the real property plaintiff filed an amended complaint and defendant filed an amended answer. The action is, in effect, one commenced under the provisions of Section 9(a) of the Trading With the Enemy Act.

Trial was had on October 12, 1955, before the Court sitting without a jury. The matter was sub-

mitted for decision upon the filing of the final brief on December 15, 1955.

The plaintiff was represented by Irvine P. Aten and James Kubota, and the defendant was represented by Laughlin E. Waters, United States Attorney; Percy Barshay appearing.

The basic issue in this case is whether or not the plaintiff was an "enemy" as defined in the Trading With the Enemy Act.

The provision of the Act pertinent to the issue is:

"Section 2. Definitions. The word 'enemy' as used herein, shall be deemed to means for the purposes * * * of this Act——

"(a) Any individual * * * or any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war * * *

"(b) The government of any nation with which the United States is at war * * * or any officer, official, agent * * * thereof.

"Section 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.

"(a) Any person not an enemy * * * claiming any interest, right or title in any * * * property which may have been * * * seized by [the Alien Property Custodian] hereunder and held by him * * * may institute a suit in equity * * * in the Dis-

trict Court of the United States for the district in which such claimant resides * * * (to which suit the Alien Property Custodian * * * shall be made a party defendant) to establish the interest, right, or title so claimed, and if so established the Court shall order the * * * conveyance, transfer, assignment or delivery to said claimant of the * * * property so held by the Alien Property Custodian."

The basic issue resolves itself into two questions: (1) Whether the plaintiff was resident within Japan at the time the property was vested on December 9, 1947, and (2) whether the plaintiff, by virtue of his service in the Japanese Army, was thereby an officer or agent of the Japanese Government within the meaning of the Trading With the Enemy Act.

At the outset of the trial counsel for the attorney general stated, "* * * I think so far as this case is concerned, at all times material to the issues in this case, he [the plaintiff] was both an American citizen and a Japanese citizen. We do not claim that he lost his American citizenship."

The facts disclose that the plaintiff was born in Fresno, California, on April 18, 1912. His parents were Japanese citizens and they never acquired American citizenship. In 1917 he and his parents went to Japan for a visit and remained there until 1919 when they returned to the United States. In 1924 plaintiff and his parents went to Japan and his parents never returned to the United States. His

father died in Japan in 1932 and his mother died there in 1945. Plaintiff did not return to the United States until 1950.

Plaintiff's birth was registered by his father with the Japanese Consulate in San Francisco on April 27, 1912, and was entered in his father's family census register in Japan on June 7, 1912.

Prior to 1924 plaintiff attended grammar school in Fresno, and thereafter continued his education in Japanese schools, completing grammar school and high school in Hiroshima, graduating in 1930. He spent the next two years at home preparing for entrance into medical college. In 1932 he commenced his studies at the Nippon Medical College in Tokyo and completed his course in that institution in 1938. In April, 1938, he became an interne in the Red Cross Hospital in Tokyo, and served in that capacity until October of that year when he entered the Japanese Army.

When plaintiff reached the age of twenty years he became subject to compulsory military service in the Japanese Army. He was excused from taking the physical examination because he was attending medical college and was granted a deferment until he completed his medical course. Upon completion of his medical education he reported for duty at an Army camp in Tokyo and entered the Army as a medical officer candidate in October in 1938. He served as a doctor in the Army and was stationed in Manchuria until 1945 when he was

captured by the Russians and taken to Siberia. He was held as a prisoner of war by the Russians until December, 1948, when he was released and returned to Japan.

While in the Army, plaintiff married a Japanese woman and became the father of two children, both of whom were entered in the family census register, but the births were never registered in any American Consulate in Japan. In January of 1948 plaintiff filed an application with the American Consulate in Yokohama to register as an American citizen. He received an identity registration card in April, 1949, and in October of 1949 he applied for a passport to return to the United States. He received a passport in October of 1950 and returned to this country shortly thereafter.

In the case of Guessefeldt v. McGrath, 342 U. S., 308, 72 S. Ct. 228, 96 L. Ed. 342, decided in 1951, the Court had occasion to interpret the meaning of the words "resident within" as used in the Trading With the Enemy Act. The Court said in 342 U. S. 311, "The first question to be decided is whether the claimant was 'resident within' the territory of a nation with which this country was at war within the meaning of sections 2 and 9 (a) of the Trading With the Enemy Act. He was physically within the enemy's territory. He contends, however, that the meaning conveyed by 'resident within' is something more than mere presence; at the least a domiciliary connotation, if not domicile, is implied.

"Legislative history leaves the meaning shrouded. Some use of the term 'domicile' as the touchstone of enemy status is to be found in the Congressional hearings and reports. But on the floor, Representative Montague, one of the managers of the bill, unequivocally stated under close questioning that the statutory language was intended to cover much more than those domiciled in enemy nations. Yet prisoners of war, expeditionary forces and 'sojourners' were not, he said, intended to be included. 55 Cong. Rec. 4922 * * *

"* * * To hold that 'resident within' enemy territory implies something more than mere physical presence and something less than domicile is consistent with the emanations of Congressional purpose manifested in the entire Act, and the relevant extrinsic light, including the decisions of lower courts on this issue, which we note without specifically approving any of them. See McGrath vs. Zander, 85 U.S. App. D. C. 334, 177 Fed. 2d 649; Josephberg vs. Markham, 152 Fed. 2d. 644; Stadtmuller vs. Miller, 11 Fed. 2d. 732; Vowinckel vs. First Federal Trust Co., 10 Fd. 2d. 19; Sarthou vs. Clark, 78 Fed. Supp. 139."

Plaintiff was not physically present in Japan on December 9, 1947, the date of the vesting order. He was a prisoner of the Russians in Siberia from September 9, 1945, to December 4, 1948. He was in Manchuria from the date of his entrance into the Japanese army in October, 1938, to the date of his capture by the Russians in September, 1945.

As noted in Guessefeldt vs. McGrath, supra, the Supreme Court held that "resident within" a territory implied more than mere physical presence and something less than domicile. This statement of the Supreme Court was commented upon in the case of Public Administrator of New York County vs. Brownell, 115 Fed Supp. 139. That case involved an action for the return of property taken from plaintiffs' intestate by the Alien Property Custodian, who claimed that the distributees of the estate of plaintiffs' intestate were "enemies" within the meaning of the Trading With the Enemy Act. At the time of the vesting orders, the distributees were actually living in Germany or German-occupied Poland, having left Latvia because of fear, as they alleged, of Russian invasion. The defendant argued that there must be residence somewhere and that if distributees' residence was not Germany, it must have been Latvia, which, after the distributees' departure, and before the time of the vesting orders, had become German-occupied territory. The Court, in commenting on Justice Frankfurter's language in the case of McGrath vs. Guessefeldt, supra, stated at page 140, "When Justice Frankfurter said that the words 'resident within' meant something more than mere physical presence and something less than domicile, I do not think that he meant to imply that everyone domiciled within an enemy country was resident within it. What I think he meant was that so long as one was resident within an enemy country, the residence did not have to have all of the characteristics of domicile to render the resident

an enemy. Actual residence, however, there had to be." (Underscoring ours.)

In construing the words "a bona fide nonresident of the United States," as used in Section 16(a) of the Internal Revenue Code, 26 U.S.C.A. section 116, prior to the 1942 amendments, the Court, in Commissioner of Internal Revenue vs. Swent, 155 Fed. 2d. 513, stated at page 515, "The word 'resident' (and its antonym 'nonresident') are very slippery words, which have many and varied meanings. Sometimes, in statutes, residence means domicile; sometimes, as in the instant case, it clearly does not. When these words 'domicile' and 'residence' are technically used by persons skilled in legal semantics, their meanings are quite different. This distinction is clearly set out in Matter of Newcomb's Estate, 192 N.Y. 238, 84 N. E. 950, 954:

"As 'domicile' and 'residence' are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of 'residence' as in the city and country, but only one 'domicile.' 'Residence' means living in that particular locality, but 'domicile' means living in that locality with intent to make it a fixed and permanent home. 'Residence' simply requires bodily presence as an inhabitant in a given place, while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile." To the same general effect is the case of Fuller vs. Hofferbert, 204 Fed. 2d. 592.

It is the view of the court that since plaintiff was not physically present in Japan for a couple of years prior to the Vesting Order, but was during said period a prisoner of war of the Russians in Siberia and remained such for almost a year subsequent to the Vesting Order, plaintiff was not "resident within" Japan within the meaning of the Trading With the Enemy Act.

The next phase of the problem is to determine whether or not the plaintiff was an "enemy" of the United States by reason of his service as an officer in the Japanese Army.

The word "enemy" as used in the Trading With the Enemy Act is deemed to include "the government of any nation with which the United States is at war * * * or any officer * * * or agent * * * thereof." The record is without conflict that plaintiff was an officer in the Japanese Army from October, 1938, until he was demobilized in 1948.

The State Department's file relating to plaintiff's application for passport was received in evidence as Government's Exhibit "P." The opinion of the Vice Consul of the United States at Yokohama in Japan, states:

"Applicant acquired Japanese nationality automatically at birth in 1912 and appears to have retained it since that time.

"Applicant served in the Japanese Army as a doctor from October 10, 1938, to December 4, 1948.

He volunteered for service in 1938, he has stated in writing, because he was subject to conscription as an ordinary soldier having passed the required examination and because by volunteering as a doctor he appeared eligible for more favorable conditions and possibly a shorter term of service. It appears that applicant was at no time after his entry into the army able to leave the service and that his service was continuous from 1938 to 1948, when he was demobilized after three years internment in Siberia.

"It is the opinion of this office, which has examined this application carefully and received a report that there is no unfavorable information regarding applicant in the files of local United States investigative agencies, that applicant did not lose his United States citizenship under Section 401(c) of the Nationality Act by reason of service in the Japanese Army continuing on and after January 13, 1941 (Passport Code No. 4.2c) and that he has performed no other act causing loss of United States citizenship.

"Applicant's two brothers are in the United States. He speaks little English and the oath of allegiance was administered in Japanese.

"Because applicant volunteered and served in the Japanese army, his passport application is respectfully referred to the Department for decision, even though it appears that he did not by such service lose his clair to United States citizenship."

This file contains a telegram from the Consul at Yokohama to the Secretary of State which states, "Applicant has today overcome presumption of expatriation and is being issued a passport." Counsel for the Attorney General questions the propriety of the issuance of the passport to the plaintiff on the ground that the State Department's files do not disclose that that Department was aware of the fact that plaintiff had taken an oath of allegiance to the Emperor of Japan in 1938, and that had a clear disclosure of the oath been made, the State Department would have carefully considered whether it was a voluntary oath causing loss of plaintiff's American citizenship and justifying denial of his application for a passport. The file clearly discloses that the plaintiff had served in the Japanese Army as an officer from October 10, 1938, to December 4, 1948. Implicit in such service is the oath of allegiance to the Emperor of Japan.

When plaintiff entered the armed forces of Japan in 1938, Japan and the United States were friendly nations. When plaintiff arrived at the age of twenty years, he was subject to conscription into the Japanese Army as a national of Japan. He was in the service on December 13, 1941, at the time of the declaration of war by the United States against Japan, and he remained continuously in the service until his demobilization in 1948. There is nothing in the record to indicate that during his service in the Japanese Army plaintiff performed any acts or rendered any service other than in the usual and ordinary line of duty.

Counsel for the Attorney General frankly stated that plaintiff, at all times material to the issues in this action, was both an American citizen and a Japanese citizen. The status of a person with dual citizenship has been reviewed in many decisions of our reviewing courts.

In Mandoli vs. Acheson, 344 U.S. 133, the petitioner was born in the United States of unnaturalized Italian parents. The Court stated on page 134, "These circumstances made him a citizen of the United States by virtue of our Constitution, and a national of Italy by virtue of Italian law."

Petitioner Mandoli was taken to Italy by his parents when he was a baby. He saw service in the Italian army when he was 29 or 30 years of age. In his action to establish his citizenship, judgment in the District Court went against him on the ground that expatriation had resulted from two causes, first, that his service in the Italian army was voluntary and that he then took an oath of allegiance to the King of Italy, and secondly that he had elected between his dual citizenship in favor of Italy by continuing to reside in Italy after obtaining his majority. On appeal the Government abandoned the first ground because the Attorney General ruled that such service in the Italian army by one similarly situated could "only be regarded as having been taken under legal compulsion amounting to duress."

In the case of Kawakita vs. U. S., 343 U.S. 717, the Supreme Court held that one with dual citizen-

ship need not make a choice, but may continue his dual citizenship. In that case petitioner was born in the United States and went to Japan with his parents when he was 18 or 19 years of age. The Court stated at page 733:

"One who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting. The nature of those claims has recently been stated as follows:

"'A person with dual nationality may be subjected to taxes by both states of which he is a national. He is not entitled to protection by one of the two states of which he is a national while in the territorial jurisdiction of the other. Either state not at war with the other may insist on military service when the person is present within its territory. In time of war if he supports neither belligerent, both may be aggrieved. If he supports one belligerent, the other may be aggrieved. One state may be suspicious of his loyalty to it and subject him to the disabilities of any enemy alien, including sequestration of his property, while the other holds his conduct treasonable.' Orfield, The Legal Effects of Dual Nationality, 17 Geo. Wash. L. Rev. 427, 429.

"Dual nationality, however, is the unavoidable consequence of the conflicting laws of different countries. See Hackworth, supra, pp. 352 et seq. One who becomes a citizen of this country by reason of birth retains it, even though by the law of another country he is also a citizen of it. He can under cer-

tain circumstances be deprived of his American citizenship through the operation of a treaty or an act of Congress; he can lose it by voluntary action. See Perkins vs. Elg, supra, p. 329. But American citizenship, until lost, carries obligations of allegiance as well as privileges and benefits. For one who has a dual status the obligations of American citizenship may at times be difficult to discharge. An American who has a dual nationality may find himself in a foreign country when it wages war on us. The very fact that he must make a livelihood there may indirectly help the enemy nation. In these days of total war, manpower becomes critical and everyone who can be placed in a productive position increases the strength of the enemy to wage war. Of course a person caught in that predicament can resolve the conflict of duty by openly electing one nationality or the other and becoming either an alien enemy of the country where he resides or a national of it alone. Yet, so far as the existing law of this country is concerned, he need not make that choice, but can continue his dual citizenship."

The Court is convinced by the record in this case that the plaintiff's service in the armed forces of Japan after December 13, 1941, was involuntary on his part. Assuming that his service prior to that time was voluntary, it is the Court's view that such service was in obedience to the laws of Japan of which the plaintiff was also a national. It is therefore the Court's view that the service of plaintiff as an officer in the Japanese army does not consti-

tute him an "enemy" as that term is defined in the Trading With the Enemy Act.

As a non-enemy of the United States, plaintiff is entitled to maintain this action under 9(a) of the Trading With the Enemy Act. Plaintiff is therefore entitled to the proceeds resulting from the sale of the property, together with an accounting of rents received and necessary expenditures made during the period of seizure. If the parties cannot agree as to the accounting, the matter will be set down for further hearing on that subject. In the event the parties are able to agree on the accounting, counsel for the plaintiff are directed to lodge with the Clerk of this Court, findings of fact and conclusions of law and form of judgment not inconsistent with the views expressed herein within the time provided by the rules of this court.

The Clerk of this court is directed to mail forthwith copies of this Memorandum and Order to all counsel.

January 31, 1956.

/s/ GILBERT H. JERTBERG,
United States District Judge.

[Endorsed]: Filed February 1, 1956.

In the United States District Court, Southern District of California, Northern Division

No. 1028—ND

AKIRA MORIMOTO,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, as successor to the Alien Property Custodian,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This case came on regularly for trial before this Court on October 12, 1955. The plaintiff was represented by Irvine P. Aten, Richard V. Aten and James Kubota; and the defendant was represented by Laughlin E. Waters, United States Attorney, and Percy Barshay, Special Assistant to the Attorney General, Percy Barshay appearing. Evidence both oral and documentary was introduced and the case was argued orally and by written briefs. The Court, having heard and considered the evidence and the arguments of counsel, and the matter having been submitted to the Court for its decision, and the Court being fully advised in the premises, does now make its findings of fact, conclusions of law and judgment as follows:

Findings of Fact

I.

By vesting Order No. 10267, December 9, 1947, 12 F. R. 8452, issued pursuant to the provisions of the Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C.A. App. Section 1 et seq., the Attorney General of the United States vested in himself two lots of improved real property in Fresno, California, rights to accrued rentals and rights in the fire insurance policy covering the property. The Order was issued upon a finding that the property was owned by Akira Morimoto, plaintiff herein, and that he was a resident of Japan and a national of Japan, a designated enemy country. The said two lots of real property are described as follows:

> Lots 10 and 11 in Block 37 of the Town (now City) of Fresno, as per map thereof recorded June 8, 1876, in Plat Book 1, page 2, Fresno County Records.

At the time said Vesting Order issued, plaintiff was the owner of said real property.

II.

At the time of the commencement of this action, the defendant, J. Howard McGrath, was the duly appointed, qualified and acting Attorney General of the United States and the person in charge of the Office of Alien Property, Department of Justice of the United States, which office had prior to the commencement of this action lawfully assumed the

functions of the Alien Property Custodian under the Trading With the Enemy Act. The defendant Herbert Brownell, Jr., is the lawful successor of the defendant J. Howard McGrath in said offices and has been duly substituted as defendant in this action.

III.

Plaintiff duly filed with defendant, under Section 9(a) of the Trading With the Enemy Act, notice of his claim for the return of the property vested as aforesaid, which claim is still pending, and said property has not been returned to plaintiff.

IV.

Subsequent to the commencement of this action and pursuant to agreement between the parties hereto, the real property heretofore described was sold by the Attorney General of the United States for the sum of $10,000.00 and said sum of $10,000.00 accordingly became and now is the subject matter of this action in the place of said real property. The parties hereto have stipulated that if plaintiff is entitled to recover the said sum of $10,000.00 in this action, he is also entitled to recover the sum of $1,174.53 on account of rentals and insurance policy refunds received by the United States on account of said real property, and that payment of $1,500.00 of the judgment in this action may be withheld by defendant as a reserve for satisfying plaintiff's income taxes, if any, due for the years up to and including the year in which the judgment in this action, less said reserve, is paid.

V.

Plaintiff was born in Fresno, California, on April 18, 1912. His parents were Japanese citizens and they never acquired American citizenship. Plaintiff has been a citizen of both the United States and Japan at all times since his birth.

VI.

Plaintiff was taken by his parents to Japan in 1924. His parents never returned to this country. Prior to 1924, plaintiff had attended grammar school in Fresno, and thereafter continued his education in Japanese schools, completing grammar school and high school in Hiroshima, graduating in 1930. When plaintiff reached the age of twenty years he became subject to compulsory military service in the Japanese Army. He was excused from taking the physical examination because he was attending medical college and was granted a deferment until he completed his medical course. Upon completion of his medical education he reported for duty at an army camp in Tokyo and entered the Army as a medical officer candidate in October of 1938. He served as a doctor in the Army and was stationed in Manchuria until September 9, 1945, when he was captured by the Russians and taken to Siberia. He was held as a prisoner of war by the Russians until December 4, 1948, when he was released and returned to Japan. Plaintiff was very ill when he was returned to Japan, such illness having been caused by malnutrition during the aforesaid imprisonment, and he returned to the United States, filed the aforesaid claim, and com-

menced this action as soon as he reasonably could. In January of 1949, plaintiff filed an application with the American Consulate in Yokohama to register as an American citizen. He received an identity registration card in April, 1949, and in October of 1949 he applied for a passport to return to the United States. He received a passport in October, 1950, and returned to this country in December, 1950.

VII.

The aforesaid service of the plaintiff in the armed forces of Japan was in obedience to the laws of Japan, of which plaintiff was a national. Such service by the plaintiff after the commencement of the war between Japan and the United States on December 8, 1941, was involuntary on his part. Plaintiff was not on account of such service, or otherwise, at any time after the beginning of said war an officer, official or agent of Japan or any political or municipal subdivision thereof, within the meaning of the Trading With the Enemy Act.

VIII.

Plaintiff was not physically present in Japan from September 9, 1945, to December 4, 1948. During that period he was a prisoner of the Russians in Siberia. Plaintiff was not resident within or doing business within Japan within the meaning of the Trading With the Enemy Act during said period or at the time of the aforesaid vesting order, December 9, 1947.

IX.

Plaintiff was at no time an enemy or an ally of an enemy as those terms are defined in the Trading With the Enemy Act.

X.

It is not true that this action was commenced after the time limited therefor by the provisions of Section 33 of the Trading With the Enemy Act, as amended, and it is not true that this Court is without jurisdiction to entertain or determine this action.

XI.

Plaintiff and his attorneys prior to the commencement of this action entered into a written contract under which it was agreed that said attorneys should be paid 10% of the value of the property returned by the Alien Property Custodian, if such return was accomplished by negotiation or compromise, and that if an action to secure such return was prosecuted said attorneys should be paid such sum in addition to said 10% as the Court in which such action is prosecuted should determine reasonable and just. At the trial of this action the matter of the approval of the fees of plaintiff's attorneys under Section 20 of the Trading With the Enemy Act was deferred by agreement of counsel for plaintiff and defendant. On April 9, 1956, subsequent to the announcement of the Court's decision in this case, plaintiff's attorneys moved in open Court for an order fixing the fees of plaintiff's attorneys in the manner hereinafter set forth,

due notice of such motion having theretofore been given to plaintiff and to the attorneys for the defendant. No one appeared for the purpose of opposing said motion, and the Court received the said contract in evidence, and considered the affidavit filed in connection with said motion and the records and files in this action, and after due consideration granted said motion on April 9, 1956. The Court finds that 20% of the aforesaid sum of $11,174.53 is a reasonable and just attorneys' fee for the prosecution of this action, reserving to said attorneys the right to apply for additional fees in the event of a new trial and/or appeal in this case. The Court approves the excess of said fees over 10% and finds that there were special circumstances of unusual hardship requiring the payment of such excess.

Conclusions of Law

This Court has jurisdiction of this action under Section 9 (a) of the Trading With the Enemy Act. As a non-enemy of the United States, plaintiff is entitled to maintain this action under Section 9 (a) of the Trading With the Enemy Act. Plaintiff is entitled to judgment against the defendant in the sum of $11,174.53, subject to the reserve of $1,500.00 set forth in Finding IV above; plaintiff's attorneys are entitled to a contingent fee of 20% of the aforesaid sum of $11,174.53, payable out of any monies paid to plaintiff on account of the judgment in this action.

It Is Hereby Ordered that judgment be entered in accordance with these Findings of Fact and Conclusions of Law.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law it is Ordered, Adjudged and Decreed that plaintiff have judgment against defendant for the sum of $11,174.53, provided that payment of $1,500.00 of said judgment may be withheld by defendant as a reserve for satisfying plaintiff's income taxes, if any, due for the years up to and including the year in which the judgment in this action, less said reserve, is paid. A contingent fee to plaintiff's attorneys of 20% of said sum of $11,174.53, payable out of any monies paid to plaintiff on account of the judgment in this action, is hereby approved, reserving to said attorneys the right to apply for additional fees in the event of a new trial and/or appeal in this case.

Dated April 20th, 1956.

/s/ GILBERT H. JERTBERG,
United States District Judge.

[Endorsed]: Filed April 20, 1956.

Docketed and entered April 25, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Herbert Brownell, Jr., Attorney General of the United States, as successor to the Alien Property Custodian, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of this court dated June 30, 1952, denying defendant's motion to dismiss the above-entitled action and from the final judgment entered in this action on April 20, 1956.

LAUGHLIN E. WATERS,
PERCY BARSHAY,

By /s/ PERCY BARSHAY,
Attorneys for Defendant.

[Endorsed]: Filed June 11, 1956.

In the United States District Court, Southern District of California, Northern Division

No. 1028-ND

AKIRA MORIMOTO,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to Alien Property Custodian,

Defendant.

Honorable Gilbert H. Jertberg, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

October 12, 1955

Appearances of Counsel:

For the Plaintiff:
IRVINE P. ATEN,
RICHARD ATEN, and
JAMES KUBOTA.

For the Defendant:
PERCY BARSHAY,
Special Assistant to the Attorney General.

* * *

The Court: I guess Mr. Brownell has been substituted.

Mr. Barshay: Yes, Judge Beaumont signed an order some time ago.

The Court: Yes. Proceed.

Mr. Irvine Aten: If the Court please, this is an action of Dr. Morimoto to recover from the office of the Alien Property Custodian property seized and vested in the office, under the Trading with the Enemy Act. I presume your Honor has looked through the pleadings.

The Court: Yes.

Mr. Aten: That being the case, I don't think I will take the time to make an extended statement as to what we expect to prove. I think that appears fairly well in the pleadings. But I might ask coun-

sel, Mr. Barshay, if the question of the statute of limitations is to be raised here.

Mr. Barshay: No, it is not, because, if I recall correctly, Judge Beaumont ruled that the statute did not operate to bar the suit, and I presume without appeal that [3*] has become the law of the case.

The Court: As I understand, he denied the motion to dismiss.

Mr. Barshay: That is correct, on that ground, so I assume in the absence of appeal that becomes the law of the case. Incidentally, the law has been changed anyway and the time for filing claims has been extended, so that question is moot.

Mr. Aten: And one further question, the question of citizenship, can you tell whether it is admitted?

Mr. Barshay: Well, which citizenship, Japanese or American?

Mr. Aten: American citizenship.

Mr. Barshay: Oh, with respect to Dr. Morimoto's American citizenship, I have this to say, that we concede that Dr. Morimoto, of course, was born in the United States, and acquired American citizenship by birth.

We claim that at all material times he was also a Japanese citizen; he was a dual national, in other words.

Whether at this present moment he is no longer a Japanese citizen is something I don't know. I think when he took the oath of allegiance to the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

United States in connection with his passport application in 1949 that that possibly may have operated to do away with his Japanese citizenship, but I am not certain of that. I do know this, [4] and I can state, Mr. Aten, as a matter of record that on the Japanese official records the family census registry maintained in Japan, he is still regarded as a Japanese citizen, and I think I have an official document from Japan indicating that to be the fact.

However, I think so far as this case in concerned, at all material times to the issues in this action he was both an American citizen and a Japanese citizen. We do not claim that he has lost his American citizenship.

* * *

Mr. Barshay: Yes. I can state very briefly, this action is one under Section 9 (a) of the Trading with the Enemy Act to recover property which was vested by the then Alien Property Custodian, in—well, I think it was the Attorney General, in 1947. The only action which may be maintained as an action under the Trading with the Enemy Act is in the Act itself. As I see it, there are two issues; well, there is one main issue, the basic issue was whether [5] Dr. Morimoto was an enemy as defined with the Trading with the Enemy Act. In this case that breaks down into two questions, one, whether he was a resident in Japan at the time the property was vested in 1947, and, secondly, whether by virtue of his service in the Japanese Army, in which he served from 1938, I think to

1948, when he was demobilized, whether he was thereby an officer or agent of the Japanese government within the meaning of the Trading with the Enemy Act.

* * *

Mr. Aten: Just briefly in reply, I might say it is our contention that the Trading with the Enemy Act does not deprive a United States citizen of his constitutional right of taking property without due process, and we have authority for that. And also, we claim the evidence will show that at all times he was a resident of the United States, that he was involuntarily conscripted into the Japanese army, and was forced to remain there during the war, where he served as a doctor, and was captured by the Russians about [6] the time they entered the war and was removed to Siberia, and in fact was in Siberia at the time of the vesting.

This taking of this property was not until two years after hostilities ceased, they ceased in September of 1945, and the taking of this property was in October, 1947. And we claim it is entirely out and beyond any purview of the original intention or of the present intention of the Trading with the Enemy Act. Trading with the Enemy Act was passed to prevent property of a person like Dr. Morimoto, living in another country at the time, being used for the benefit of the enemy giving them aid and support. This property is entirely untainted, there was no communication during the war, and no chance of that, and for the government to seize is not protection against the operations of

the enemy forces two years after hostilities ceased, but is a confiscation of property. That is our position.

Dr. Morimoto, will you be sworn?

DR. AKIRA MORIMOTO

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Have that seat there.

Direct Examination

By Mr. Irvine Aten:

Q. Your name is Akira Morimoto?

A. That is correct. [7]

Q. And you are the plaintiff in this action to recover this property? A. Yes, sir.

The Court: It is my understanding that by stipulation or consent of the plaintiff that the property was sold and the proceeds of sale amounted to $10,000; is that correct?

Mr. Barshay: That is correct. They are the subject matter of this action now instead of the real property.

The Court: Yes. So the sum of $10,000 is the action. And there is no contention on either side that the sale of the property in any way affects the legal issues?

Mr. Barshay: Oh, no. As a matter of fact, it was stipulated it should not. [8]

* * *

(Testimony of Dr. Akira Morimoto.)

Q. Doctor, where were you born?

A. I was born in Fresno, in April 18, 1912.

Q. And you lived here after your birth how long? A. I lived until my twelve year old.

Q. You were twelve years old? A. Yes.

Q. And you attended school here during that period?

A. Yes, I attended fifth grade in Lincoln Grammar School. [11]

Q. What happened in that twelfth year, 1924?

A. Pardon me?

Q. What happened? Where did you go?

A. Oh. On account of my parents, my father's ill health, they decided to go to Japan, and since I were still young they decided to take me along with them.

Q. You say "they"; that referred to your father and mother?

A. Father and mother.

Q. And you had two older brothers living here. They remained here, did they? A. Yes, sir.

Q. They remained here, and have remained here all the time? A. Yes, sir.

Q. What property had your father at that time?

A. The property——

The Court: You are talking about 1924?

Mr. Aten: Yes, the year 1924 when they departed to Japan.

The Court: Yes.

A. The property of pending trial now, and besides he had ranch in Bowles, about 100 acres.

(Testimony of Dr. Akira Morimoto.)

Q. (By Mr. Aten): In Bowles, you say?

A. Yes. And also he had a large sum loaned to people [12] in this country.

Q. He had outstanding accounts of money that was owing to him? A. That is right.

Q. In the approximate sum of how much?

A. Around $3,800.

Q. Yes. You say he decided to go on account of his health? A. Yes, that is correct.

Q. And when you arrived in Japan where did you live? A. We live in Hiroshima.

The Court: Excuse me, Doctor, was that your first trip to Japan?

The Witness: No, that was my second. First in 1917 to 1919 my parents made a visit to Japan, and at that time I was only five years old. I went with them.

Q. (By Mr. Aten): In 1924 did your parents own any property in Japan?

A. No. None whatsoever.

Q. So you established a home there and you lived there. Your father lived there until what year?

A. Until his death in 1932.

Q. Yes. Did he ever return to this country?

A. Since 1924?

Q. Yes. [13] A. No, sir.

Q. Had he made provision to return?

A. Yes. He tried to come back, and after he obtained the passport and just ready to depart to this country he got heart attack and succumbed.

(Testimony of Dr. Akira Morimoto.)

Q. After he had his passport to return?

A. Yes, sir.

Q. At the time of his death in 1932, you were how old, 20 years old?

A. I was just 20, yes.

Q. Yes. Now, this property that is in question here, these lots over on F Street, were left to you by will by your father, and you have owned them since that time, since 1932?

A. Yes, sir, that is correct.

Q. Did you continue your schooling after your father's death? A. Yes, sir.

Q. And where did you go to school?

A. I went to the Nippon Medical College, in Tokyo.

Q. And did you graduate there?

A. Yes, sir.

Q. In what year? A. In 1938.

Q. 1938. And did you do interne work following your graduation? [14] A. Yes, sir.

Q. And what, if anything, interfered with that?

A. I was conscripted from army in October, 1932. That was during my interneship.

The Court: Now——

Q. (By Mr. Aten): You don't mean '32, you mean '38? A. '38, yes.

Q. So you were conscripted into the army, and you served in the army from that time, in the Japanese army as a doctor? A. Yes, sir.

Q. And in what area were you?

(Testimony of Dr. Akira Morimoto.)

A. I was in the district of Manchuria all the time.

Q. You were taken immediately to Manchuria and remained there all the time that you were in the Japanese army? A. That is right.

Q. I understand you were taken over, that is, captured as a prisoner by the Russians. When did that occur?

A. We were surrender to the Russians in October 18, 1945, and I was taken to Siberia in September 9, 1945——

Q. Did you——

A. Pardon me, maybe I said October 18.

Q. You meant September?

A. I mean August 18th we surrendered to Russia, and I [15] was taken to Siberia September 9th, the same year.

Q. By the Russian troops?

A. That is right.

Q. And how long did you remain as a prisoner with the Russians?

A. Approximately three years and three months, until December 4, 1948, I remained in Russia.

Q. And you were returned to Japan at that time? A. That is right.

Q. During the time you were held by the Russians and during the time that you were in the Japanese army, you were occupied with your duties as a physician? Did the Russians also employ you in that capacity?

A. My primary duty was hard labor.

(Testimony of Dr. Akira Morimoto.)

Q. You are speaking now in the Russian army?

A. In the camp as P.O.W., and my primary duty is hard labor, but since I am—I was a doctor they made me act as a doctor, too, but my main title or job was hard labor.

Q. You treated not only the Japanese prisoners, but you also treated the Russians as a doctor?

A. No, not the Russians as a doctor, but my own camp doctor. I did not have any rewards whatsoever from Russia.

Q. No, but I understood that you treated some of the Russians?

A. Oh, Russian people? [16]

Q. Yes.

A. Well, that is out of my job, that just from my good intentions, or what you call it.

Q. Yes, but you did volunteer? A. Yes.

Q. What was your physical condition at the time you were released by the Russians in December, 1948?

A. Well, at that time I was in very, very awful condition, even my family did not recognize me.

Q. What was your normal weight?

A. My normal weight was around 160 to 170 pounds.

Q. What was your weight when you were delivered back to Japan?

A. Less than 100 pounds.

Q. What was the cause of that?

A. In my opinion the main cause is malnutrition.

(Testimony of Dr. Akira Morimoto.)

Q. Malnutrition?

A. Yes, malnutrition means from lack of food.

Q. Now, when you returned to Japan, what efforts or steps did you take to return to the United States? A. Yes.

The Court: May I inquire first, did the witness return to Japan in December of '48, or was there some time elapsed from his release from the Russians and his return, actual return to Japan? [17]

Q. (By Mr. Aten): Will you answer that, Doctor?

A. Well, I was released from Russia in December 1st and we reached Japan December 4th.

The Court: You returned to Hiroshima, did you?

The Witness: No, Miyazu, that was the harbor where we reached Japan.

Q. (By Mr. Aten): Now, one question further, during the time you were in Manchuria, and in the service of the Japanese army, were you married?

A. Pardon me?

Q. Were you married while you were in the service? A. Yes; yes, sir.

Q. What year? A. I married 1943.

Q. '43? A. Yes.

Q. And is your wife—and you have two children? A. Yes, sir.

Q. Did they live in Hiroshima?

A. Well, my wife was living with me at Manchuria for about one year, and later we separated

(Testimony of Dr. Akira Morimoto.)

and I was taken to Russia, and she came back to Japan by herself.

Q. She then was not in Hiroshima at the time of the [18] explosion? A. No.

Q. But your mother was and was killed?

A. Yes.

Q. And where are the wife and children now?

A. They are living in Tokyo.

Q. And how?

A. Well, their parents are living in Tokyo.

Q. Her family are taking care of them, and you have not been able to—— A. No.

Q. ——contribute anything to them?

A. No.

Q. After you returned to Japan, what steps did you take, if any, towards returning to the United States?

A. After I came back from Russia, I heard about my property in this country in the government guidance, by my brother's petition, and it is necessary for me to come back to this country as soon as possible, and I heard about this message from my wife. My wife had been corresponding with my brother, and she learned about this thing, so she told me about it. So, well, at that time I was very ill and weak, and I could not—not able to make a trip to here, or other place, so I took a little time to convalesce——

Q. Yes. [19]

A. But meanwhile I was starting the proceed-

(Testimony of Dr. Akira Morimoto.)

ings necessary for me to apply for American citizenship.

Q. You did apply?

A. Yes, I applied for my American citizenship in April, 1949.

Q. You applied to the American consulate there?

A. Yes, American general consulate in Yokohama.

Mr. Barshay: May I interrupt there just a moment, your Honor? Dr. Morimoto has just spoken of applying for American citizenship. I think this would be a good point to get some clarification, because I can see if he was American he was applying for something else.

Q. (By Mr. Aten): It was a passport you were applying for? A. Yes, sir.

Q. And that matter was investigated by the Department there, and the Department here, and finally your passport was issued to you as an American citizen?

A. Yes. That was in October, 1944—I mean forty—1950. It takes about one year and a half. Finally I got the passport.

Q. And it came through and then you engaged passage and arrived here in the United States in December? A. Yes.

The Court: Well, now, when did you make application for a passport? When did you make the application? [20] When did you initiate it?

The Witness: April 1948. 1949, pardon me.

(Testimony of Dr. Akira Morimoto.)

The Court: 1949, and then the passport was issued in?

The Witness: Was issued October, 1950.

The Court: And then you arrived in this country in December?

The Witness: December, 1950, yes.

Q. (By Mr. Aten): Doctor, during the time you were in school, and in fact during the time you were in Japan and in Manchuria and Russia, what was your intention as to returning to America?

A. Well, there is many reasons for that. First, we all have a big ambition and all to going abroad is one of our dreams, and the fact that I have the American citizenship was the very envy for everybody, and I myself consider it a very privilege for me, and I always intend to come back to my own country.

The Court: I think most of that answer is probably not responsive to the question.

Mr. Barshay: I was going to object.

The Court: Most of it is not responsive.

Mr. Barshay: I move to strike it.

The Court: I think I will grant the motion. Perhaps the last statement may be material, but I will strike the answer on the ground that it is not responsive, and you can [21] reask the question.

Q. (By Mr. Aten): Just answer the question: what was your intention as to returning to America?

A. Oh. Well, I inherited my property from my father.

(Testimony of Dr. Akira Morimoto.)

Q. No. You are giving reasons now, but what was your intention? Did you intend to return to the United States?

A. Oh, I intended to come back or not?

Q. Yes.

A. Oh. Yes, certainly I intended to come back.

Q. At all times?

A. All the time, yes.

Q. After you arrived here, Doctor——

Mr. Barshay: I don't mean to interrupt, but may I ask he make the question a little more specific in view of the fact that the witness just testified it was his intention at all times, if he can fix it with respect to dates I think it would be very pertinent at this time.

Mr. Aten: Well, I would think, Mr. Barshay, if he says at all times——

Mr. Barshay: Since his birth?

Mr. Aten: Since he went to Japan.

Mr. Barshay: That is exactly what I would like to have him fix.

Q. (By Mr. Aten): Was that what you had in mind, ever [22] since you went to Japan you had in mind returning here?

A. Well, at the time when I went to Japan I was so young I have no particular intention or desire, but after I attended to the medical school, that was after 20 year old, later, then I build up my intention gradually, and I wanted to come back all the time.

Mr. Aten: Yes.

(Testimony of Dr. Akira Morimoto.)

The Court: Well, do I understand that after you completed your medical education——

The Witness: Yes.

The Court: In 1948——

The Witness: '38.

The Court: ——'38 your intention to return was gradually developed? Is that right?

The Witness: Already at that time I was definitely trying to come back.

Q. (By Mr. Aten): Well, I understood you to say, perhaps I was mistaken, that from the time you were 20 years old—— A. Yes.

Q. ——you had that intention?

A. Intention, that is correct.

Q. So that would be 1932?

A. That is correct.

Q. And you didn't graduate from medical school until '38? [23] A. '38. [24]

* * *

The Witness: I entered the Long Beach General Hospital in October 13, 1951. I said October?

Mr. Aten: Yes.

The Witness: Oh, pardon me. It was February 13, 1951.

Q. (By Mr. Aten): That was two months after you arrived in this country?

A. That is right.

Q. Let me ask you, Doctor, at the time you received your passport in Japan—— A. Yes.

Q. ——did you have any knowledge at that time of the fact that you had tubercular trouble?

(Testimony of Dr. Akira Morimoto.)

A. At that time I did not know about tuberculosis, but I had diabetes.

Q. What do you think was the cause or brought on your tubercular and diabetic condition?

A. Well, I am very much sure this malnutrition or [25] weakening during—in Siberia caused me diabetes and this diabetes caused the tuberculosis.

Q. About what was your weight at the time you arrived in this country?

A. Well, a little over 100 pounds, 120.

Mr. Aten: 120. I believe that is all, if your Honor please.

Cross-Examination

By Mr. Barshay:

Q. Dr. Morimoto, you say that you arrived in Japan at the age of 12 in the year 1924, is that correct? A. Yes, sir.

Q. And with whom did you live at that time?

A. With my father and mother.

Q. Do you recall the house in which you lived, and its address? A. In Hiroshima?

Q. Yes. A. Yes.

Q. What is the address?

A. 1124 Minami Chida-Machi.

Q. I believe you stated that you lived there until 1932 with your parents, is that correct?

A. That is right, yes, until I enter my college, medical college. [26]

Q. And in 1932 you went to Tokyo, is that correct? A. Yes.

(Testimony of Dr. Akira Morimoto.)

Q. I believe you stated also that your parents owned no property in Japan? A. No.

Q. Isn't a fact that your parents owned the home and the lot, which I believe was adjacent to 1146, at that time? A. Yes.

Q. Isn't it also a fact—is that correct?

A. Yes. Home——

Q. When did you——

The Court: Let the witness complete the answer.

Mr. Barshay: I am sorry.

The Witness: Only the home, that's all.

Q. (By Mr. Barshay): In other words, that was the home of your parents, and they owned it at that time? A. Yes.

Q. When did your father buy it, Dr. Morimoto?

A. Oh, about——

Q. I think I can tell you. Your father's name was what? A. Tsurukichi Morimoto.

Q. Yes. Would you say that the date that he purchased that house was April, 1924?

A. April, 1904? [27]

Q. 1924.

A. 1924? I can't recall the date, but I am sure it was about six months or more later.

Q. After you arrived in Japan?

A. Yes, that is my recollection.

Q. You are certain that he owned it. He bought it and subsequently owned it until he died?

A. At the time we were staying at his friends' home, we did not have any home.

(Testimony of Dr. Akira Morimoto.)

Mr. Barshay: I move to strike the latter part of the answer.

The Court: Well, I don't think it is responsive. The motion to strike is granted.

The question is, if you can recall, when your parents purchased this home in Hiroshima.

The Witness: Yes.

The Court: And as I understand your testimony it was approximately six months after all of your arrived in Japan?

The Witness: Yes, that is my recall.

Q. (By Mr. Barshay): Did you live there with your parents while you attended school in Hiroshima? A. Yes.

Q. Your mother lived with you at that time?

A. Yes. [28]

Q. After you graduated from the lower grade school, I guess you call it public school——

A. Yes.

Q. ——in Hiroshima, you went where?

A. High school.

Q. You went to high school? A. Yes.

Q. In Hiroshima? A. Yes.

Q. And when did you graduate from high school in Hiroshima? A. In 1930.

Q. And did you still live at the home of your parents during your period of attendance in the high school in Hiroshima? A. Yes.

Q. Then in 1930 you went where?

A. Well, I was preparing for the entrance to the medical college.

(Testimony of Dr. Akira Morimoto.)

Q. How long did that take?

A. 1930 to 1932.

Q. And where did you live at that time?

A. At that time I was living with my parents.

Q. With your parents in Hiroshima?

A. Yes. [29]

Q. And in 1932 it was, was it not, you went to Tokyo? A. That is right.

Q. And Toyko was about how far from Hiroshima, would you say? About six, seven hundred miles? A. About 800 miles, I should say.

Q. And when you went to Tokyo in 1932 you began your medical studies at the Nippon Medical College, is that correct? A. Yes.

Q. And do you recall where you stayed?

A. Yes.

Q. During the period of your medical studies in Tokyo?

A. Yes, I was boarding at my friend's house.

Q. Was his name Ishii?

A. That is correct.

Q. Do you recall the addresses at which you stayed there? A. 1012 Kamimeguro.

Q. Was that the only address at which you stayed while you were in Tokyo?

A. No. I stayed there about two years, and then moved to Nakano.

Q. 443 Arai Nakano-Ku?

A. That's right.

Q. Were those the only addresses at which you

(Testimony of Dr. Akira Morimoto.)

were physically present while you were studying in the medical school in Tokyo? [30]

A. Yes.

Q. Dr. Morimoto, do you have any recollection on whether you gave the Nippon Medical College and the Red Cross Hospital in Tokyo any information about your residence at the time you entered those two institutions? A. Red?

Q. Perhaps I had better rephrase it.

A. Red?

Q. In other words, on your school records——

A. Yes.

Q. ——and your hospital records——

A. Yes.

Q. ——do you recall what addresses appeared as your official addresses?

A. In Japanese custom there were two addresses, for the residential address; one is domicile address, and one is just the temporary address.

Q. Yes.

A. And so I give the address as my domicile place.

Q. In other words, the address of your domicile you gave was 1146—— A. Ninami.

Q. ——Ninami Chica-Machi, Hiroshima.

A. Yes.

Q. You gave the Hiroshima address as your permanent [31] residence or domicile? Isn't that correct? A. Yes.

Q. You didn't give any address in the United States as your permanent domicile, did you, Doctor?

(Testimony of Dr. Akira Morimoto.)

A. No.

Q. Now, Dr. Morimoto, I believe you stated on direct examination that you were conscripted into the Japanese army, is that correct?

A. That is correct.

The Court: I think, Mr. Barshay, that we will take the customary morning recess. We will take a short recess.

(A short recess was taken.)

Mr. Barshay: Before I ask the reporter to read the last question, your Honor, I would like to go back and ask one further question about Dr. Morimoto's schooling.

Q. Dr. Morimoto, as I understand it, you attended medical college in Tokyo from the year 1932 to the year 1938—— A. Yes.

Q. ——a period of six years?

A. That is right.

Q. It would be true, would it not, that during the school year you would have a vacation of a month or two? A. Oh, yes.

Q. Where did you go during those vacation times? A. I usually went to home. [32]

Q. You usually went home; that is to say, to Hiroshima to stay with your mother in Hiroshima? Your father was already dead, as I recall it?

A. Yes.

Q. Now, Dr. Morimoto, I believe you stated on direct examination that when you entered the Japanese army in 1938, in the latter part of 1938——

(Testimony of Dr. Akira Morimoto.)

A. Yes.

Q. ——you went in because you were conscripted?

A. That is correct.

Q. Are you certain that you did not volunteer for service in the Japanese army at that time?

A. No, sir.

Q. You are certain that you did not volunteer?

A. I am certain I did not volunteer.

Q. You are certain that you did volunteer?

A. I did not.

Q. Did not, is that correct?

A. That is correct.

Q. Were you conscripted as a private soldier in the army at that time?

A. Yes, sir. That is the general rule that the army acts. Every people in Japan is conscripted as a soldier, but there were opportunity for the technical people, like myself, if I want to be the doctor, then they give me the position as a doctor; and if I didn't want to be a doctor, I have to be a soldier, and if I want to be a soldier I have to stay there three years in army, and if I become doctor then the year is only two years, and also the title would be doctor. There is a little privilege for becoming a doctor officer. But in the true sense at that time that I am army doctor I am half civilian and half army because every military man we didn't have full rights as a soldier. That is the system at the time of the army.

Mr. Barshay: Dr. Morimoto has stated so much

(Testimony of Dr. Akira Morimoto.)

there that without being able to put my finger on it I think a lot is not responsive.

Q. What I wanted to make certain of, Dr. Morimoto, is this, whether, as you have said several times, you were in fact conscripted or drafted into the Japanese army as a private soldier?

A. That is correct.

Q. Is your answer to that yes, you were conscripted as a private soldier into the Japanese army? A. Yes.

Q. Dr. Morimoto, do you recall signing certain documents when you applied for a passport in Yokohama in the year 1949, was it, or '48?

A. '49.

Q. You recall signing an application for a passport [34] at that time? A. Yes.

Q. Do you recall signing in connection with that application—— A. For the——

Q. ——for a passport a document relating to your service in the Japanese army?

A. Yes.

Mr. Barshay: May I be excused for a moment to locate it, your Honor?

The Court: Yes.

Mr. Barshay: Dr. Morimoto——

The Court: Mr. Barshay, has counsel seen the document?

Mr. Barshay: No. This is the original, Mr. Aten, and this is a certified authenticated copy, of a Japanese document, consisting of the statement Dr. Morimoto made in connection with his application

(Testimony of Dr. Akira Morimoto.)

for passport, and this is a photostatic copy, which you may keep.

Does your Honor want to take a photostatic copy also while I ask the question?

The Court: Yes.

Mr. Aten: No objection, your Honor.

Mr. Barshay: Thank you.

Q. Dr. Morimoto, I show you a document in Japanese, consisting of two pages, the second of which bears the [35] signature of Akira Morimoto, and ask whether that is your signature?

A. Yes.

Q. Can you tell me whether this is a statement you made—— A. Yes.

Q. ——in connection with your application for a passport to return to the United tates in the year 1949? A. Yes. (Examining document.)

Q. And if you will, will you also state whether the American translation attached thereto is substantially correct?

A. Yes, this original document which I wrote in Japanese is correct.

Q. Is the entire document there in your handwriting? A. Yes.

Q. I didn't know that.

A. But in this English translation I think there is a little misinterpretation here. It says medical college——

Q. Well, will you read that part in English which you say has been incorrectly interpreted?

A. The army had a system where those who had

(Testimony of Dr. Akira Morimoto.)

graduated or expected to graduate from a medical college or medical school could volunteer for commission as a regular army medical doctor for a short period of two years. Calls for medical officers were made twice, in spring and in autumn. [36] But in here it use the word "volunteer", this word.

Q. What is the word in Japanese, spoken in English?

A. Number four. Well, I wrote in here "segan"; the direct translation is "volunteer", but the meaning in here I state in here is a choice; that is more correct meaning in here.

Q. You mean the same Japanese word may be translated either "volunteer" or "choice"? Is that what you are trying to say, Dr. Morimoto?

A. Well, I prefer to use the word "choice" in here at this place, not "volunteer", because the Japanese language the meaning is choice or volunteer become very involved.

Q. Well, as a matter of fact, to digress for a moment, from the document itself, were you actually conscripted or drafted at that time, or were you subject to draft by virtue of the fact that you had graduated from medical school? A. Yes.

Q. And were no longer attending an educational institution? A. No.

Q. Is that the fact? In other words, was your situation such that you could have been drafted if you didn't volunteer?

A. Not could have, but I, well——

Q. Well—— [37]

(Testimony of Dr. Akira Morimoto.)

A. I have to be conscripted.

Q. But you weren't actually conscripted at the time? In other words, at the time you actually entered the army—— A. Yes.

Q. ——and took the oath of allegiance to the Emperor of Japan, which I believe you took, had you actually been drafted or conscripted?

A. Yes, in October of 1938.

Q. As a private?

A. No; at that time I was conscripted as doctor.

Q. Conscripted as a doctor?

A. Let me explain a little bit further. My physical examination was held in May, 1938, and——

Q. Let me interrupt right there. After your physical examination did you get your orders to report for duty in the army?

A. That is right. Physical examination for conscription.

Q. In other words, you took the physical examination—— A. Yes.

Q. ——in May?

A. Yes, and I did pass that examination I would have to be conscripted.

Q. You passed it?

A. I passed that physical examination.

Q. Then what happened? [38]

A. Then I have to be conscripted, so I made my choice.

Q. Isn't it a fact that you stated somewhere that it would not be until the latter part of that year that you could be compelled to report for duty?

(Testimony of Dr. Akira Morimoto.)

Isn't that correct? After taking your physical examination in April, that it would be at least six or eight months before you would receive orders to report for duty? A. After that.

Q. Isn't that correct? Isn't a fact then that you never did receive orders to report for duty, but that you volunteered as a medical office candidate in April or May?

Mr. Aten: I object to the question, if the Court please. The witness stated two or three times that he did not volunteer; he made a choice; he had an option.

The Court: Well, let me ask you, Mr. Morimoto——

The Witness: Yes, your Honor.

The Court: ——did you have to register when you became twenty-one?

The Witness: No, I didn't have to register because it is the rule at that time.

The Court: In other words——

The Witness: Automatically.

The Court: ——the law automatically is that all males on reaching 21 became subject to conscription in the army?

The Witness: That is right. [39]

The Court: Was it 20 or 21?

Mr. Barshay: I believe the age is 20.

The Witness: At that time we have a system of counting age, instead in the full age it is 20 years, but we used to call 21 years.

(Testimony of Dr. Akira Morimoto.)

The Court: I see. And as I understand it, in May of 1938 you received notice from the army——

The Witness: Yes.

The Court: ——or from the armed forces to submit to a physical examination?

The Witness: That is correct.

The Court: Now, you hadn't registered in any way up to that time?

The Witness: No, I didn't register.

The Court: All right. And that physical examination was designed to determine whether or not you were fit for service in the army?

The Witness: That is right.

The Court: All right. You passed that examination?

The Witness: Yes.

The Court: Now, after you passed the examination did you receive a call from the government to report for induction, that is, to get your uniform and be assigned to a camp?

The Witness: Yes.

The Court: Did you receive that? [40]

The Witness: Yes, that was in October.

The Court: That was in October of the same year?

The Witness: Yes.

The Court: And did you report to the place designated in October of 1938? Did you report?

The Witness: Well, we made the document when we took the physical examination, and the first time

(Testimony of Dr. Akira Morimoto.)

the government called us we give the address, and that is all.

The Court: But my point is, when you took the examination in '38 you were at the medical college?

The Witness: No, at that time I was in Red Cross Hospital, interne.

The Court: Interning with the Red Cross. Was that in Tokyo?

The Witness: Yes.

The Court: All right. Then how long did you remain at the Red Cross Hospital after you took your physical examination?

The Witness: That was from May to October, about six months.

The Court: All right. Then where did you go from the Red Cross Hospital, in October?

The Witness: Direct to the army camp.

The Court: And where was that?

The Witness: Tokyo. [41]

The Court: In Tokyo?

The Witness: Yes.

The Court: Now, did you go there as a doctor?

The Witness: Yes. What do you call?

Mr. Barshay: Medical officer candidate?

The Witness: Candidate, yes.

Mr. Barshay: Medical officer cadet?

The Witness: Cadet, yes.

The Court: But at no time did you go to any camp where the ordinary person would go? In other words, did you go to any camp where the private soldiers went?

(Testimony of Dr. Akira Morimoto.)

The Witness: Well, we were in the same camp.

The Court: In the same camp?

The Witness: Yes.

The Court: But in a diffeernt section or part?

The Witness: Yes.

The Court: Now, how did it happen that you went to the officer candidate cadet section instead of to the other section where the private soldiers went? How did that happen?

The Witness: Well, as I tried to explain before, when I took the physical examination I passed the physical examination, so they offered me the option, which one you want to take, whether you want to be doctor or you want to be the soldier, they showed me the offer, so at that time I made the decision and I took the officer choice, the doctor choice. [42] I didn't volunteer but took a choice.

Mr. Barshay: To clarify in my own mind again, I am sure you have stated, but in what month was it that you took the physical examination?

A. In May.

Q. (By Mr. Barshay): And in what month was it that you actually entered the service?

A. In October.

Q. And what was your rank at that time?

A. At that time I was surgeon, cadet surgeon.

Q. Cadet surgeon? A. Yes.

Q. What was your regiment, do you recall? Was it the First Imperial Guards Regiment?

(Testimony of Dr. Akira Morimoto.)

A. That is correct.

Q. Now, Dr. Morimoto, I believe you stated on direct examination that you had formed an intention to return to the United States? A. Yes.

Q. As I understand it, that intention was formed gradually over a period of time beginning some time after you arrived in Tokyo in 1932, to go to medical college, is that correct? A. Yes.

Mr. Aten: Pardon me, Mr. Barshay, I would like to ask [43] one question in connection with this conscription, as I think it has been clarified now with the exception of one thing and I think it would fit in here and would be proper here, with your permission.

Mr. Barshay: If the Court has no objection, I have no objection, of course.

Mr. Aten: Doctor, at the time that you reached the age of 20 years, what, if anything, happened in reference to your connection with the army?

The Witness: Yes, at that time I was to be conscripted as the law says, but since I was student at the medical college I applied for a deferment.

Mr. Aten: And you were granted deferment until graduation?

The Witness: That is right, sir.

Mr. Aten: Yes.

Q. (By Mr. Barshay): Dr. Morimoto, with respect to that last statement, do you have anything in writing from the Japanese army stating that you were granted such deferment at that time, in 1932? Do you have a letter? A. Right now?

(Testimony of Dr. Akira Morimoto.)

Q. Yes, did you ever receive one in writing?

A. Yes, I received calling paper from the government, calling for my physical examination.

Q. But that was not an order to report for duty in the [44] army, was it? It wasn't a draft order or conscription order, was it?

A. No, that was just——

Q. It was a notice to appear for physical examination? A. Yes.

Q. Isn't that so? In other words, your physical examination was deferred because you were in an institution of learning, taking a medical course, isn't that correct? A. Yes.

Mr. Barshay: May I have the last question read? My last question with respect to his intentions.

(The question was read as follows: "As I understand it, that intention was formed gradually over a period of time beginning some time after you arrived in Tokyo in 1932, to go to medical college, is that correct?")

Q. (By Mr. Barshay): Do I understand correctly then that up until 1932 you had no such intention, is that correct?

A. Well, I am not sure because I was so young.

Q. Well, in 1932 you were 20 years of age, in 1931 you were 19. Did you have any such intention at that time, in 1931 when you were 19?

A. Well, I can't tell whether I had or not.

Q. Isn't it a fact that at that time you considered your father's home in Hiroshima—— [45]

(Testimony of Dr. Akira Morimoto.)

A. Yes.

Q. ——your permanent home?

A. Considered it home?

Q. Yes.

A. No, I didn't consider that my permanent home.

Q. Well, did you consider it your home?

A. Yes.

Q. Wasn't it the place to which you returned during vacation time, while you were attending medical school? A. Yes.

Q. Wasn't it the place that your father and mother lived? A. Yes.

Q. Wasn't it the home that you fell heir to when your father died in 1932? A. Yes.

Q. Wasn't it the permanent domicile, registered as such under the Japanese census law, in your name when you acquired title to it in 1932?

A. Yes——

Q. Wasn't it the place——

Mr. Aten: Just a moment.

Mr. Barshay: I am sorry.

The Court: If you haven't completed your answer, you may.

A. Well, let me explain about this home. My father [46] purchased that home for his temporary residence, on the fact that to rent the house is very expensive, so he had some money from the financial reasons. It is more convenient to buy the home, and so whenever he wants to come back to this country he can sell it. So I don't think he purchased the home as a permanent residence. While we were liv-

(Testimony of Dr. Akira Morimoto.)

ing over there naturally I considered that is my own so I return there.

Q. (By Mr. Barshay): As a matter of fact, wasn't there a bookstore attached to the home, too?

A. Bookstore?

Q. Yes.

A. No, no, we don't have any business or nothing.

Q. What business did your father engage in while he was in Japan prior to his death?

A. No business, nothing at all.

Q. Dr. Morimoto—— A. Yes.

Q. ——did you at any time after you reached the age of 21 years, which was in the year 1932, while you were still in medical college——

A. Yes.

Q. ——did you ever register with the American Consulate, either in Tokyo or in Hiroshima, as an American citizen? [47] A. No, sir.

Q. Did you ever go to the American Consulate for the purpose of explaining that you were an American citizen and that you were by virtue of that fact, and the fact that you eventually intended to return to the United States, entitled to the protection of the United States? In other words, did you ever go to the American Consulate and register and claim the protection of the United States authorities?

Mr. Aten: That is objected to as incompetent, irrelevant and immaterial.

Mr. Barshay: Very important, your Honor.

(Testimony of Dr. Akira Morimoto.)

The Court: I will overrule the objection.

Mr. Barshay: The answer is no?

The Witness: No, but I want to explain about——

Mr. Barshay: Your Honor, may I suggest any explanation come from examination by opposing counsel? I just want to bring out certain bare facts, if I may.

The Court: Well, I think I will permit the witness to explain his answer. Your answer to the question is no?

The Witness: I did not, no.

The Court: But you indicated that you wanted to make some explanation?

The Witness: The reason I didn't call the Consul is from my ignorance, because I didn't know anything about those proceedings. I have contact with government consul at [48] certain periods and I didn't know it was the necessary procedure.

Q. (By Mr. Barshay): But you know now that you could have gone to the Consulate?

A. If I knew about that I should have done that, but I didn't do that because of my ignorance.

Q. Did you speak English at the time, Doctor?

A. Oh, yes.

Q. In other words, you never even attempted to get the assistance of the American authorities to avoid service in the Japanese army, isn't that a fact, whether from ignorance or otherwise? That is the fact, isn't it? A. Yes.

(Testimony of Dr. Akira Morimoto.)

Q. Dr. Morimoto, while you were at various stations—— A. Yes.

Q. ——in the Japanese army, mostly in Korea and Manchuria—— A. Manchuria, yes.

Q. ——and Siberia, as a prisoner of war of the Russians—— A. Yes.

Q. ——wasn't it true that your home was in Hiroshima at those times? A. Yes.

Mr. Barshay: I think that will be all for cross-examination now. Your Honor, may I reserve, as I intend on my direct to offer various documents—I would like to [49] arrange them during the lunch hour, and I would like to reserve the privilege of examining Dr. Morimoto further, if necessary, when I offer those documents in evidence.

The Court: Do you intend to offer the document concerning which you examined the witness?

Mr. Barshay: Oh, yes, I am sorry. I can offer that one right now, or when I offer the others.

The Court: As I understood, Mr. Aten, you had no objection?

Mr. Aten: We have no objection.

The Court: The document has been identified by the witness, so the document shown to the witness will be received as Government's Exhibit A.

Mr. Barshay: And may I with respect to this document and any others I offer, may I have the original marked and then withdraw it and substitute a photostatic copy for the record?

The Court: Yes, that will be the order.

(Testimony of Dr. Akira Morimoto.)

(The document referred to was marked Government's Exhibit A, and was received in evidence.)

GOVERNMENT'S EXHIBIT A

Japan, City of Tokyo,
Embassy of the United States of America—ss.

I, James R. Riddle, Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, do hereby certify that the attached document is a true and correct photo copy of an original document in the files of the American Consulate General at Yokohama, Japan, temporarily in the custody of the Embassy at Tokyo, the same having been carefully examined by me and compared with the said original and found to agree herewith word for word and figure for figure.

In Witness Whereof, I have hereunto set my hand and the seal of the Embassy of the United States of America at Tokyo, Japan, this eighth day of September, A.D. 1955.

[Seal] /s/ JAMES R. RIDDLE,
Consul of the United States of America.

Service No. 9276;
Tariff No. 38;
No fee prescribed.

(Testimony of Dr. Akira Morimoto.)

Reasons Why I Volunteered for Commission as Medical Doctor of the Japanese Forces

1. At the time I graduated from medical college in 1938, Japanese law provided that all men of the age of twenty were under obligation to serve in the Army.

2. I was obligated to undergo physical examination for conscription in 1932, but, as I was then a student of the preparatory department of the medical college, this examination was postponed until my graduation.

3. In May, 1938, the year I graduated from medical college, I underwent examination for conscription, in accordance with the law, and was qualified for regular military service. It was determined that I go into military service in December of that year.

4. In those days, the Army had a system where those who had graduated or were expected to graduate from a medical college or medical school could volunteer for commission as a regular Army medical doctor for a short period of two years. Calls for medical officers were made twice, in spring and in autumn.

5. I had no desire to enter the military forces, so I did not respond to the call for medical officers in the spring, but, as I had already been determined to enter the Army as a regular soldier as a result

(Testimony of Dr. Akira Morimoto.)

of my conscription examination, the fact was that I would be compelled to serve for two years as a regular even though I had entered as a common soldier, and, furthermore, the situation in those days was such that the service might be extended to three years or perhaps longer. I, therefore, thought that it would be more to my advantage to utilize my capabilities and serve as a medical officer if I must serve in the Army either way, and so I volunteered in response to the Army's call for short-term medical officers in autumn.

6. Furthermore, the Army had a system where short-term medical officers, if they desired, could become permanent regular medical officers if volunteer applications were submitted before their term of duty became terminated. I, however, did not volunteer and in 1940, after the termination of my two years' regular service, I was transferred to the first reserve.

I hereby swear that I had volunteered for commission as medical doctor of the Army only to perform my obligation of military service, and that this absolutely was not based on my wish.

October 20, 1949.

[Seal] /s/ AKIRA MORIMOTO.

(Testimony of Dr. Akira Morimoto.)

Certificate

I, James R. Riddle, Consul of the United States of America in and for Tokyo, Japan, duly commissioned and qualified, do hereby certify that Takao Konya is at the present time one of the official translators in the employ of the American Embassy, Tokyo, Japan.

In Witness Whereof, I have hereunto set my hand and official seal of the Embassy of the United States of America at Tokyo, Japan; this ninth day of September, A.D. 1955.

[Seal] /s/ JAMES R. RIDDLE,
Consul of the United States of America.

Service No. 9588.
Tariff No. 38.
No Fee Prescribed.

Received in evidence October 12, 1955.

The Court: Mr. Barshay, is this an extra copy?

Mr. Barshay: No, I am afraid not, your Honor; I just have two photostats, one I gave to Mr. Atan and one your Honor has, and may that be used as the substitute for the record? [50]

The Court: Yes. Well, then, if there is no objection the photostatic copy of Government's Exhibit A will be received as Government's Exhibit

(Testimony of Dr. Akira Morimoto.)

A, and the original may be returned to the government.

Mr. Richard Aten: Would your Honor like to have this copy?

The Court: Yes. I will return that to Mr. Aten later.

Mr. Barshay: I think I have no others.

The Court: Are you through with this witness?

Mr. Barshay: Subject to what I just stated, I am through with my cross-examination of Dr. Morimoto at this point.

The Court: Do you have any other questions?

Mr. Irvine Aten: Yes, I think just a couple of questions I would like to ask.

Redirect Examination

By Mr. Irvine Aten:

Q. This property in Hiroshima in which the family lived while you were there, do you still own it?

A. No, sir. That property was ruined by the A-bomb, at the time the A-bomb was dropped on Hiroshima, and after I came back from Siberia that was just a vacant place, so I just sold it.

Q. You sold it? A. To the other—— [51]

Q. Now, going to the option you exercised when you entered the medical service in the army——

A. Yes.

Q. ——for what term was that? What term of years was that supposed to be? A. Two years.

(Testimony of Dr. Akira Morimoto.)

Q. What happened at the end of two years?

A. End of the two years I was enlisted as a reserve officer and also was drafted to continue my duty.

Q. Did you have any right or opportunity to drop out of the service?

A. Yes, I made a petition I want to be out of the service, but that was refused.

Q. In other words, the two-year rule had been abrogated?

A. That was the promise and I was expecting to be out of the army at that time.

Q. So you were kept in the service until your capture as a matter of army regulations?

A. After—during that two years I was a lieutenant.

The Court: You were what? I didn't get the last word.

The Witness: Lieutenant.

Q. (By Mr. Aten): But your remaining in the service was not voluntary? A. No. [52]

Q. It was obligatory under the laws and under the rules of service?

A. That is correct, sir.

Q. You stated your father didn't engage in business while he was there. What was the condition of his health all the time you were in Japan?

A. Well, he had diabetes all the time, and his physical strength was very weak.

Q. Yes. And the property that he had, the in-

(Testimony of Dr. Akira Morimoto.)

come property was the property that was in this country? That was his only property?

A. Yes.

Q. And did he intend to return here?

A. Yes, he had——

Mr. Barshay: Objection.

The Court: I think that probably calls for the opinion and conclusion of the witness. Objection sustained, and the answer is stricken.

I would like to ask a question, Mr. Aten.

Mr. Aten: Certainly.

The Court: You mentioned the fact that you became a member of the officers' reserve?

The Witness: Yes, sir.

The Court: Well, now, your original service was to be for two years? [53]

The Witness: Two years, yes.

The Court: All right. Then at the end of two years, did you go into the reserve?

The Witness: Yes, automatically my title became reserve officer.

The Court: All right. And how long were you a reserve officer?

The Witness: Until I came back from Russia, about 1940 to 1948.

The Court: Was there any interruption of your military service?

The Witness: No, not a single day of interruption.

The Court: And when did you acquire the rank of lieutenant?

(Testimony of Dr. Akira Morimoto.)

The Witness: As I explained before, first when I was called for duty I went in as a medical officer candidate, and my rank was surgeon, and two months later I was commissioned as a lieutenant.

The Court: Did you continue to have that rank? Were you promoted?

The Witness: Yes, about three—four years later I was promoted to captain.

The Court: I see. Did you have to take an examination for that promotion?

The Witness: No. [54]

The Court: Did you apply for it?

The Witness: No, there was many occasions army tried to make me return to the actual duty, not the reserve, and tried to put me into the actual duty, then I could have had more rapid promotion, but I did not take that offer.

The Court: Well, what did you have to do to be promoted from a lieutenant to captain?

The Witness: That is automatic promotion. In fact, the regular officer in active duty has a certain period to be eligible to promote, and that was two years from lieutenant to captain; but I was in the reserve so it took four years to become captain.

The Court: I think we will recess at this time for lunch, and, gentlemen, may I inquire as to how long counsel expect this matter might take?

Mr. Aten: I believe, if the Court please, that the evidence we have introduced is practically all.

The Court: In other words, you think we can finish today?

(Testimony of Dr. Akira Morimoto.)

Mr. Barshay: I think so. I have just certain documents.

The Court: Well, we will recess until 2:00 o'clock.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 p.m. of the same day.) [55]

October 12, 1955—2:00 P.M.

Mr. Barshay: Your Honor, I would like to correct a statement I made earlier this morning with respect to the statute of limitations. You will recall that I stated that the statute of limitations was no longer an issue in this court because Judge Beaumont had made it the law of the case by denying the motion to dismiss.

I just want the record to show that by making that statement I am not saying it may not be raised on appeal, which might be taken. I am restricting it solely to this court.

The Court: But your position is that this Court is bound to follow Judge Beaumont's ruling on that?

Mr. Barshay: Yes, since we did not take an appeal from his ruling.

The Court: Very well.

Mr. Barshay: Now, if your Honor please, I would like——

Mr. Aten: May I examine before we close?

Mr. Barshay: Oh, surely.

The Court: Were you through with direct and redirect of Dr. Morimoto?

Mr. Barshay: You are addressing your question to me? I have a group of exhibits, and if I offer them I may want to ask Dr. Morimoto to concede his signature on one or two [56] of them.

The Court: Well, the Court had several questions which it would like to ask of Dr. Morimoto.

Mr. Aten: I also have one explanation I want him to make in reference to the doctor. Will you take the stand?

AKIRA MORIMOTO

resumed the stand, having been previously duly sworn, and was examined and testified further as follows:

Mr. Aten: Shall I proceed?

The Court: Yes, you proceed.

Mr. Aten: If the Court please, there is on file in the case admissions and denials in response to request for admission of facts. At the suggestion of Mr. Barshay some time back we resorted to that procedure as we did not know at that time whether or not the doctor would be able to be present at the trial, and this procedure was taken, and the original, I understand, is in the file. I wish to offer in evidence in this case now those admissions and denials in response to those questions. I think it should be made a part of the record.

The Court: What is your position?

Mr. Barshay: I certainly have no objection. I think they might be considered in evidence since they are a part of the record.

The Court: In view of the statement of both

(Testimony of Dr. Akira Morimoto.)

counsel [57] then the original request for admissions and responses thereto will be received and marked Plaintiff's Exhibit No. 1.

Mr. Barshay: May I interrupt there, your Honor? I don't believe I filed my original request, but I simply served it upon Mr. Aten, but what he has done in his responses he has set forth my questions and then responded, and I think it is all there now.

The Court: Well, Mr. Clerk, let's see the document so we can identify it.

The Clerk: You mean the admissions?

The Court: Yes. Well, the document filed in this court under date of April 6, 1955, entitled "Admissions and Denials in Response to Request for Admission of Facts."

Mr. Aten: That is the document we refer to.

The Court: Well, that document will be received in evidence then and marked Plaintiff's Exhibit No. 1.

(The document referred to was marked as Plaintiff's Exhibit No. 1, and was received in evidence.)

(Testimony of Dr. Akira Morimoto.)

PLAINTIFF'S EXHIBIT No. 1

In the United States District Court, Southern District of California, Northern Division

Civil No. 1028

AKIRA MORIMOTO,

Plaintiff,

vs.

J. HOWARD McGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian,

Defendant.

ADMISSIONS AND DENIALS IN RESPONSE TO REQUESTS FOR ADMISSION OF FACTS

State of California,
County of Los Angeles—ss.

Akira Morimoto, plaintiff in the above-entitled action, being first duly sworn, deposes and says, in response to defendant's Request for Admission of Facts dated March 9, 1955 (defendant's statements of fact being hereinafter quoted for ready reference):

"1. Plaintiff's parents were born in Japan and were Japanese nationals exclusively at all times."

Plaintiff admits this.

(Testimony of Dr. Akira Morimoto.)

"2. Plaintiff's parents returned to Japan from the United States in 1924 and remained in that country thereafter without returning to the United States."

Plaintiff admits this.

"3. The legal residence, permanent place of abode and domicile of plaintiff's parents after 1924 was in Japan."

Plaintiff denies this. Plaintiff does not believe that his parents intended to permanently reside, or establish domicile, in Japan when they left this country in 1924.

At that time plaintiff's father was in ill health and for that reason sold his business, a soft drink bottling works, and returned to Japan. He was then fifty-five years of age. He sold the business to a partnership consisting of his son Kaoru Morimoto, and one H. Kimura, even though, as plaintiff is informed, a much higher price for the business was offered by another company. The partners above-named agreed in the written contract of sale of said business not to sell the business without the consent of plaintiff's father. This indicates plaintiff's father wanted to keep the business within the family so that he would have a foothold here whenever he returned. The real property described in the complaint in this action and on which the aforesaid business was located was never sold by plaintiff's father and was owned by him until

(Testimony of Dr. Akira Morimoto.)

his death, at which time it went to plaintiff under his father's will. Plaintiff's father also had a 110-acre ranch in Fresno County which he kept until 1932 in spite of the hardship of maintaining it during the depression years. Also, large sums of money were owed to plaintiff's father by people in the United States, in 1924 and up to the time of his death. In 1932 plaintiff's father obtained a passport to return to this country in order to look after his business interests, but died shortly before the scheduled sailing time.

"4. Plaintiff's parents maintained no legal residence, permanent place of abode or domicile in the United States after 1924."

Plaintiff denies this, for the reasons stated in his answer to statement 3 above. Plaintiff further states that the real property described in the complaint in this case was, in 1924 and also at the time of the commencement of this action, occupied by both a business building and a residence, which was the residence of plaintiff's parents at the time they left the United States for Japan in 1924. Plaintiff believes that said residence would have been available to plaintiff's parents if they had returned to the United States after 1924, although it was leased to said partners for a period of five years in the agreement of sale of said premises.

"5. Plaintiff's legal residence, permanent place of abode and domicile between 1924 and 1950 was in Japan."

(Testimony of Dr. Akira Morimoto.)

Plaintiff denies this. Plaintiff was born in the United States April 18, 1912, and is a citizen of the United States. He actually resided in the United States from the date of his birth until 1917, and from 1919 to 1924, and he considers himself to have been a legal resident of the United States all of his life. It was always his intention to return to the United States as soon as it was possible for him to do so. Plaintiff's parents left the United States in 1924 because of the father's ill health, and returned to Japan. Plaintiff was only 12 years old and dependent on his parents, who took him to Japan with them. Plaintiff was supported by his parents or other members of his family until he finished medical school. He was conscripted into the Japanese Army in 1938 while still an intern. Thereafter he remained in the Japanese Army, serving as a physician and surgeon only, until he was taken prisoner by the Russians in Manchuria in September, 1945. He was then taken by the Russians to Siberia, where he remained a prisoner until he was released by the Russians in December, 1948, and was then returned to Japan. Plaintiff returned to the United States from Japan as soon as he could secure a passport, arriving in the United States late in the month of December, 1950. During all the time that has elapsed since plaintiff was taken to Japan in 1924 he had, and now has, two brothers and other relatives living in the United States, and during that time (after his father's death) he also had in this country the business and residential

(Testimony of Dr. Akira Morimoto.)

property which is referred to above. Plaintiff never voluntarily aided the war of Japan against the United States and never owned any property in Japan or Japanese territory other than personal effects of small value.

"6. Plaintiff maintained no legal residence, permanent place of abode or domicile in the United States between 1924 and 1950."

Plaintiff denies this, basing his denial on his answer to statement 5 above.

"7. Plaintiff was a national of Japan by virtue of Japanese laws relating to nationality until 1950, when he took the oath of allegiance to the United States."

That is probably correct, but plaintiff is not sure what the Japanese law provides.

"8. Plaintiff was not drafted for military service in the Japanese Army but volunteered therefor in 1938."

Plaintiff denies this.

"9. Plaintiff swore an oath of allegiance to the Emperor of Japan in connection with his entry into military service in the Japanese Army."

Plaintiff admits this, but such oath was not a voluntary act by the plaintiff.

(Testimony of Dr. Akira Morimoto.)

"10. Plaintiff made no effort to avoid military service in the Japanese Army by asserting his status as a citizen of the United States."

Plaintiff admits this. Such assertion of his status as a citizen of the United States would have been useless, and probably dangerous, in plaintiff's opinion.

"11. Plaintiff did not vote in any election in the United States between the year 1933, when he became twenty-one years of age, and the year 1941 when World War II between the United States and Japan was declared."

Plaintiff admits this, and states also that he has never voted in any Japanese election, and has never taken any part in Japanese political life.

/s/ AKIRA MORIMOTO.

Subscribed and sworn to before me this 4th day of April, 1955.

[Seal] /s/ EVERETT N. JONES,
Notary Public, in and for said County of Los Angeles, State of California.

My commission expires November 7, 1956.

Affidavit of mailing attached.

[Endorsed]: Filed April 6, 1955.

(Testimony of Dr. Akira Morimoto.)

Mr. Aten: There is one matter, or correction that I wish to call to the Court's attention in that, and that is—I want to ask the witness, Dr. Morimoto, if he himself has looked at this and wishes to make an explanation of it. Beginning at line 4 on page 4, this statement occurs, Doctor— —

A. Yes, sir. [58]

Q. ——"Plaintiff never voluntarily aided the war of Japan against the United States and never owned any property in Japan or Japanese territory other than personal effects of small value."

A. Yes, sir.

Q. Now, I believe this morning you testified that that property in Hiroshima was left you by your father? A. Yes, sir.

Q. Now, what explanation do you wish to make of that answer that you gave in here?

A. Yes, I would like to explain a little bit about the matter. In Japan it was the custom the first son always have a right to inherit the father's property, so when my father died automatically I became the inheritance, and the name was changed to me, but actually the name was to me but actually I didn't own anything for myself. For instance, I never lived in that property, I was always out of that property, and my mother always lived there and she paid the taxes and take every care, and I never lived in my property, but the name was just changed to my name, and that was customary in Japan.

Q. And you mentioned——

(Testimony of Dr. Akira Morimoto.)

A. So actually I didn't own any property for myself.

Q. You never considered that you were the actual owner?

A. No. My mother was always taking care and she was [59] living there, and she was paying taxes, and actually mother was holding the real estate, and I never owned the property for myself.

Mr. Barshay: May I ask a question?

The Court: Yes.

Recross-Examination

By Mr. Barshay:

Q. Would this be true, Doctor——

A. Yes, sir.

Q. ——that if you had not entered your name on the family register and not reported the death of your father and not entered your name on the family register, you would not have inherited that property?

A. No. As a legal matter I do not.

Q. In other words, isn't it a fact that after your father died you reported his death to the proper authorities, and you had a new entry made on the family register to show that you were head of that family, and by virtue of those facts is it not true that legal title to that property passed to you? Is that correct?

A. Yes, but let me explain a little; by looking at the Japanese government, there is a very inter-

(Testimony of Dr. Akira Morimoto.)

esting mistake in there and that explains what I said right now. When my father died I was just a student and I was in Tokyo, so I just hurriedly came back and attended his funeral and hurried back [60] to Tokyo, so I did not register my name myself for the inheritance, but I leave the matter to my relative, so I believe it was changed to my name, but actually there was some negligence there.

The Court: I didn't get that last.

The Witness: There was some negligence.

The Court: Negligence?

The Witness: Yes. Because that document doesn't show my name in the inheritance place, and when I came back from Russia, and that property became vacant so I sold it to my other person, and this one who bought my property tried to change the name, and went to the registry office and they said there is not my name in the registry, it was still my father's name in there, so the one who bought the property have to make special procedure in my name to change the property to my name to his. Well, that shows that I didn't take care of that property myself.

Q. (By Mr. Barshay): Do I understand you to be saying——

A. Yes.

Q. ——that you personally did not——

A. No, I did not.

Q. ——notify the Japanese authorities that your father had died and that you were his heir? Is that a correct statement? [61]

A. I didn't.

(Testimony of Dr. Akira Morimoto.)

Q. You did not do that personally? A. No.

Q. Do you know who did?

A. Yes, my uncle did. Well, I believe he do that for me.

Q. Let me as you this: you say you sold the property? A. Yes.

Q. When was that?

A. After I came back from Russia.

Q. Did you receive payment for it, personally?

A. Well, I didn't——

Q. Did you or did you not? Did you receive the money for it? A. No.

Q. Who did? A. My relative in Hiroshima.

Q. How much was paid for it?

A. Well, about 70,000 yen.

Q. How much would that be in American?

A. Well, let's say less than $200.

The Court: I didn't quite understand the witness as to who received the proceeds of the sale.

Mr. Barshay: I understood him to say that he did? Am I mistaken about that? Did you receive the proceeds of that sale? [62] A. No.

Q. Who did? A. My relative.

The Court: Your relative?

The Witness: Yes.

Mr. Barshay: Why was that? Why didn't you get it? Weren't you the owner of it?

A. Well, actually I wasn't in Hiroshima, and I just give the consent to sell the property.

Q. You did give your consent?

(Testimony of Dr. Akira Morimoto.)

A. Yes, that is right. That is the reason I didn't take any proceeds.

The Court: You told your uncle to sell your property?

The Witness: Yes, that is right.

The Court: And the uncle retained the purchase price or the sale price?

The Witness: Well, they had many debts, they just paid the debts.

Q. (By Mr. Barshay): Let me ask you this question, Dr. Morimoto: How do you feel about the property here? Do you regard the Fresno property in the same class as the Hiroshima property? If that property had not been sold by the Department of Justice would you claim that it was not yours, just like you the Hiroshima property you say was not really yours? [63]

A. I would not say that.

Q. What distinction do you draw between those two properties? Why is the Fresno property any different from the Hiroshima property?

A. Well, in the first place, that Hiroshima property is just a temporary residence place for my parents, and I never have intention to live there. I always intend to come back here, so I don't intend to own that property, I don't care about that at all. That is my true feeling. So, well, after the bombing the property just became a vacant place, so I just gave away, that's all.

Mr. Barshay: I think that's all.

The Court: I would like to ask several questions.

(Testimony of Dr. Akira Morimoto.)

I want counsel to feel they have the same right to object to my questions as they have to opposing counsel's questions.

I am interested in the type of medical school that you attended. Was it a state school or a private?

The Witness: Yes, your Honor, that was a private college.

The Court: Private college?

The Witness: Yes.

The Court: And did the college charge admission, or did they charge fees?

The Witness: Yes.

The Court: For going to college?

The Witness: Yes, sir. [64]

The Court: And was it a Japanese private college, or an American private college, or what?

The Witness: Japanese private college.

The Court: Japanese private. And was there any difference in the amount students had to pay, whether they were citizens of Japan or from foreign countries?

The Witness: No, I don't think there is any difference in the fee or tuition, but private college is more expensive than state college.

The Court: Yes. But you think that an American citizen going over there would have paid the same tuition——

The Witness: That is my belief.

The Court: ——as a Japanese citizen?

The Witness: Yes.

(Testimony of Dr. Akira Morimoto.)

The Court: No, in 1932, in April I believe it was, when you took the physical examination——

The Witness: Yes.

The Court: ——you knew then that you were destined to serve either in the army as a private——

The Witness: Yes.

The Court: ——or as you put it at your option——

The Witness: Yes.

The Court: ——to serve as a medical officer?

The Witness: Yes.

The Court: And you knew that during the six years [65] that you had deferment?

The Witness: Yes. May I add a little explanation about that matter? I knew I have to go to the army, but during that time the world affairs weren't at all bad.

The Court: I didn't quite understand.

The Witness: World affairs.

The Court: World affairs.

The Witness: That's right, that was 1932 to 1938, and there was not any fear in the world, even in China there wasn't, so according to this rule if I just finished my duty for two years as an army doctor, then I will be free again, so then I will come back here, or go anywhere, and that is my obligation as long as I am going to take the vocation in Japan. I have to oblige to that degree.

The Court: When did this undeclared, if it were an undeclared war between Japan and China begin?

(Testimony of Dr. Akira Morimoto.)

The Witness: That was after I entered the army, around 1938 or '9, I believe, around 1939.

The Court: And there were no hostilities——

The Witness: No.

The Court: ——during the time you were in medical school?

The Witness: That is right, sir.

The Court: Now, how long were you in this Red Cross Hospital?

The Witness: About eight months. [66]

The Court: About eight months. Now, what sort of a hospital was that? That is, was it an international Red Cross Hospital?

The Court: Well, all the Red Cross have organization as international Red Cross, I think, I am not sure, but that was Japanese Red Cross.

The Court: Japanese Red Cross.

The Witness: Yes.

The Court: And were all of the staff, the other doctors——

The Witness: Yes.

The Court: ——and internes and administrative officers, were they all Japanese?

The Witness: Yes.

The Court: There were no American doctors?

The Witness: No, and especially I tried to take my special field in gynecology so that particular field is in America.

The Court: Were there any European professors?

The Witness: No.

(Testimony of Dr. Akira Morimoto.)

The Court: Or European doctors?

The Witness: No.

The Court: In the Red Cross Hospital?

The Witness: No, in my hospital there weren't any foreigners.

The Court: I think that is all. [67]

Mr. Barshay: If your Honor please, I would like to——

The Court: Do you rest? Does the plaintiff rest?

Mr. Aten: I have spoken with Mr. Barshay here. It is our understanding of the law that if the property is returned the matter of rents and earnings——

Mr. Barshay: May I make a suggestion? May I suggest, Mr. Aten, you make a point about that after we have concluded, because that goes to what we return if we have to return anything.

Mr. Aten: Very well, there is no objection.

Mr. Barshay: May I complete my direct?

The Court: In other words, the plaintiff rests now?

Mr. Aten: Yes.

The Court: But the matter of what is returned, if anything is returned, is still open.

Mr. Aten: It might either call for a further hearing or might be settled by stipulation.

Mr. Barshay: Now, if your Honor please, I want to——

The Court: May the Doctor step down?

Mr. Barshay: Yes. I want to offer in evidence a

series of documents in the Japanese language, and to which are attached translations.

I may state I have delivered to Mr. Aten copies of everything I am about to offer into evidence.

First, if your Honor please, I offer a letter [68] dated June 30, 1955, from the Consulate General of Japan to myself, signed by Shoichi Ban, Vice Consul of Japan, San Francisco.

The Court: Dated June 30, 1955?

Mr. Barshay: 1955.

Mr. Aten: I don't believe I saw that letter.

Mr. Barshay: I gave you a copy. There is the original, and a copy to be substituted.

Mr. Aten: Mr. Barshay, which document is it you are now offering?

Mr. Barshay: The letter of June 30th, I believe it is, from the Consulate General of Japan to myself.

Mr. Aten: On the second page of that letter the reference is made to this building on the Hiroshima property and this bookstore is included. The witness, Dr. Morimoto, has testified he knows nothing of that bookstore, there was nothing there.

Aside from that I think we have no objection to it, but he has already testified there was no such thing.

Mr. Barshay: May I say that is the record, unless you want to put him on to reaffirm that, I am perfectly willing to have him go on and make the statement again.

These are the official records obtained for me by the Consulate General of Japan, in San Francisco.

Mr. Aten: That document also shows that the owning continued from November, 1932, until March 17, 1954. Of course, [69] the whole building was destroyed in 1945.

Mr. Barshay: Well, I think his title was still unimpaired. That is simply a record of title to locate the property.

Mr. Aten: There is a further explanation the Doctor could make on the matter of the interpretation of it.

Mr. Barshay: Well, that is up to the Judge.

The Court: It seems to me, Mr. Aten, that the witness will be permitted to make any explanation or interpretation if he feels the translation does not accurately reflect it.

Mr. Aten: Should it be done before it is received?

The Court: Well, I think it should probably be done after——

Mr. Barshay: I would suggest it would be a little more orderly if I made my proffers and then Mr. Aten can take over.

The Court: Then it is my understanding, Mr. Aten, you have no objection to this letter, except that you do want your client to have the opportunity to make any explanation or interpretation?

Mr. Aten: That is correct.

The Court: All right. The letter then dated June 30, 1955, from the Consulate General of Japan to Mr. Barshay will be received as Government's Exhibit B, and the original may be withdrawn upon the substitution of a photostatic copy.

(The document referred to was marked as Government's Exhibit B, and was received in evidence.) [70]

GOVERNMENT'S EXHIBIT B

Consulate General of Japan
346 California Street
San Francisco 4, California
Telephone YUkon 2-0780

June 30, 1955.

Mr. Percy Barshay, Acting Manager,
San Francisco Office,
Office of Alien Property,
Department of Justice,
214 Federal Office Building,
San Francisco 2, California.

Your File No.: 9-21-2318 PB:ap

Dear Mr. Barshay:

The following is the outline of the reply that we received from the Ministry of Foreign Affairs in Tokyo regarding Akira Morimoto:

1. With respect to the Subject's Family Census Register:

A. The permanent domicile was No. 1146 Minami Chida-machi, Hiroshima-shi, Hiroshima-ken at the time of birth and up until 7 May 1953. Then the permanent residence was transferred to No. 1502 Mukai-mura, Aki-gun

Hiroshima-ken, Japan. The address remains the same at the present time. (Therefore, the Subject is still a Japanese national.)

B. The father, Tsurukichi died 1 November 1932; the mother, Tomo died 15 November 1945; both at No. 1146 Minami Chida-machi, Hiroshima-shi, their permanent residence.

2. With respect to Subject's Military record:

The Japanese Government records show that the Subject volunteered for military service as a Student Medical Candidate on 10 October 1938 in accordance with the Imperial Ordinance No. 6 of 1933.

3. Real estate and property holdings:

A. With respect to Mori, Kawajiri-machi, Kamo-gun, Hiroshima-ken (there is no town named Morikawajiri-machi as listed in your report), the Hiroshima-ken Justice Department reports that there is no record past or present that Subject or his parents had any holdings in this town.

B. With respect to No. 1091 Yose-machi, Tsukui-gun, Kanagawa-ken, the Subject lived at this address in care of Kajiwara, from October 1949 to about November 1950. The Government record shows that neither the Subject nor his parents held ownership to this home.

C. It was verified that the Subject resided at No. 1146 Minami Chida-machi, Hiroshima-

shi prior to entering the army. It was also verified through the Government records that Akira Morimoto and his father Tsurukichi Morimoto owned the following:

Property Description

a. Lot 101 tsubo.

Location: No. 1146 Minami-Chida-machi, Hiroshima-shi.
Owner: Tsurukichi Morimoto.
Date of Holding:
29 April 1924 to 1 November 1932.
Owner: Akira Morimoto.
Date of Holding:
1 November 1932 to 17 March 1954.

b. Lot 78 tsubo.

Location: No. 1147-1 Minami-Chida-machi, Hiroshima-shi.
Owner: Tsurukichi Morimoto.
Date of Holding:
28 April 1924 to 1 November 1932.
Owner: Akira Morimoto.
Date of Holding:
1 November 1932 to 17 March 1954.

c. Two story wood building with tile roof. Book store included.

Location: No. 1146 and 1147-1 Minami Chida-machi, Hiroshima-shi.
Owner: Tsurukichi Morimoto.

Date of Holding:
8 September 1928 to 1 November 1932.
Owner: Akira Morimoto.
Date of Holding:
1 November 1932 to 17 March 1954.

1st floor 37.25 tsubo.
2nd floor 9.5 tsubo.

I trust that the above outline is satisfactory to you.

Very truly yours,

/s/ SHOICHI BAN,
Vice Consul of Japan,
San Francisco.

SB:GI:hm.

P.S. Concerning the translation of the provisions of the Japanese Nationality Law, I must make some re-examination, but it will not take more than a few days.

[Stamped]: Received July 5, 1955; Office of Alien Property.

Received in evidence October 12, 1955.

Mr. Barshay: Now, if your Honor please, before I make my next offer, I want to explain that the Consulate General of Japan has procured for me the Japanese documents which I have to offer, and which are summarized in his letter to me, summarized in Defendant's Exhibit B.

The reason I make that statement is that he de-

livered the documents to me in Japanese without translations which I had hoped to get from Japan. Therefore it became necessary for me to have them translated by an official interpreter of the Department of Justice in San Francisco, and those translations are attached to each of the documents.

The Court: As I understand, those documents are the supporting documents that are summarized in Defendant's Exhibit B, is that right, showing the titles of property and any change of ownership?

Mr. Barshay: That is right. There are three different types of document. The first group which I offer as one exhibit relates to the permanent domicile of Dr. Morimoto and his father under the Japanese family census registration law. There are three documents with English translations, and I offer them as Defendant's Exhibit C, or perhaps we can mark these as B——.

The Court: No, I thought I would mark them C-1, C-2 and C-3.

Mr. Barshay: It may take a moment to get the copies in [71] the same order as they are marked.

The Court: I assume that counsel for the plaintiff are satisfied with the translations.

Mr. Barshay: Well, I don't know whether he has any comment on that or not.

Mr. Aten: If your Honor please, that is one of the things I want to call attention to in the document just received is the translation. There are so many of these we haven't had a chance, of course, to go through them thoroughly. They are rather

bulky and it requires some time to check them through and make the translations.

The Court: Well, the Court, of course, wants to be satisfied as to the integrity of the translations, and they will be admitted subject to any explanation or interpretation or correction that you may discover there, Mr. Aten.

Mr. Aten: I think that will be satisfactory, your Honor.

Mr. Barshay: I certainly have no objection. I have all the confidence in the world in our interpreter.

The Court: Yes, I don't question his ability.

(The documents referred to were marked as Government's Exhibits C-1, C-2 and C-3, and were received in evidence.)

GOVERNMENT'S EXHIBIT C-1

Permanent Domicile: #1146 Senda-machi, Hiroshima-shi.

Tsurukichi Morimoto—Family Head

Born July 17, 3rd year of Meiji (1870).

3rd son of Katsujiro Morimoto, family head of Mukai-ura-ku (Translator's note: Underscored may also be read "Muko-ura-ku"), Shimo-Kamogari-jimamura, Aki-gun. Reported of establishing a new family unit and accepted on March 21, 22nd year of Meiji (1889).

Reported of marriage to Tomo Kubo and accepted on April 5, 27th year of Meiji (1894).

Reported of abolishing his family unit and accepted on May 29, 5th year of Taisho (1916).

Jirokichi Morimoto, a family head, reported of having his younger brother enter into his family census record after the brother having abolished his own family unit as family head of #1214 Mukai-ura-ku, Shimo-Kamogarijima-mura, Aki-gun, and accepted on May 29th, 5th year of Taisho (1916).

Jirokichi Morimoto, family head of #1214 Mukai-ura-ku, Shimo-Kamogarijima-mura, Aki-gun reported of his younger brother's establishment of a new family unit and accepted on June 8th, 11th year of Taisho (1922).

Reported of transfer of family record from #2780 Mukai-ura-ku, Shimo-Kamokarijima-mura, Aki-gun. Accepted and entered into the record on December 6, 13th year of Taisho (1924).

Died at the permanent domicile on November 1, 7th year of Showa (1932) at 12:30 p.m. Reported by Akira Morimoto, who was living together, and accepted on the 2nd day of the same month.

Due to the report of Akira Morimoto's succession as head of the family on November 5, 7th year of Showa (1932), this family census record is deleted.

(Blank space following.)

Tomo—Wife

2nd daughter of Mitsuemon Kubo (father) and Kuno Kubo (mother).

Born November 6, 10th year of Meiji (1877).

Second daughter of Mitsuemon Kubo, family head of Kami-kamogarijima-mura, Aki-gun. Reported of marriage to Tsurukichi Morimoto on April 5, 27th year of Meiji (1894) and entered into the family census record on the same date.

Entered into the family census record, together with her husband, on May 29, 5th year of Taisho (1916).

Since her husband Tsurukichi established his own family unit on June 8, 11th year of Taisho (1922), entered into the record together with him.

(Blank space following.)

Akira

4th son of Tsurukichi Morimoto (father) and Tomo Morimoto (mother).

Born April 18, 45th year of Meiji (1912).

Born at #827 N Street, Fresno, California, U. S. A.

Reported by father Tsurukichi Morimoto and received by Consul General stationed at San Francisco on April 27, 45th year of Meiji (1912).

Was sent and entered into the family census record on June 7th of the same year.

On May 29, 5th year of Taisho (1916), was entered into the family census record along with father Tsurukichi.

On June 8, 11th year of Taisho (1922), entered into the record together with his father, since father Tsurukichi established his own family unit.

(Blank space following.)

I hereby certify that this copy is not different from the original deleted family record.

April 21, 30th year of Showa (1955).

ICHIZO TAKAYAMA,
Deputy Mayor and Acting
Mayor of Hiroshima-shi.
(Seal of Acting Mayor of Hiroshima-shi.)

Received in evidence October 12, 1955.

GOVERNMENT'S EXHIBIT C-2

Permanent Domicile: #1146 Minami-Senda-machi, Hiroshima-shi.

Former Family Head—Tsurukichi Morimoto

Akira Morimoto—Family Head

Relationship to former Family Head—4th son.

4th son of Tsurukichi Morimoto (father) and Tomo Morimoto (mother).

Born April 18, 45th year of Meiji (1912).

Born at #827 N Street, Fresno, California, U. S. A. Reported by father Tsurukichi Morimoto and received by Consul General stationed at San Francisco on April 27, 45th year of Meiji (1912). On June 7th of the same year was sent and entered into the family census record.

Since father Tsurukichi Morimoto, family head of #1214 Mukai-ura-ku (Translator's note: Underscored may also be read "Muko-ura-ku), Shimo-

Kamogarijima-mura, Aki-gun, abolished his independent family unit and entered into this family census record, along with his father on May 29th, 5th year of Taisho (1916).

Since Tsurukichi, younger brother of the family head Jirokichi Morimoto of #1214 Mukai-ura-ku, Shimo-Kamogarijima-mura, Aki-gun, separated and established an independent family unit, was entered into the new family census record along with him.

Due to death of former family head Tsurukichi on November 1, 7th year of Showa (1932), reported of the succession as the head of family and accepted on the 5th of the same month.

On December 1, 8th year of Showa (1933), due to the change of name and zoning, "Senda-machi" in the Permanent Domicile column was amended to read "Minami-Senda-machi."

Reported of marriage to Toshiko Nakahara and accepted on June 22, 18th year of Showa (1943).

Transferred the Family census record to #1502 Mukai-mura, Aki-gun and reported by Akira Morimoto and his wife, Toshiko. Accepted by mayor of Mukai-mura on May 7, 28th year of Showa (1953), notification sent here and deleted this family census record on the 9th of the same month.

(Blank space following.)

Toshiko—Wife

1st daughter of Riichi (Translator's note: Underscored may also be read "Toshikazu") Nakahara (father) Tomoe Nakahara (Mother).

Born June 8, 9th year of Taisho (1920).

Cousin of Jitsuzo Nakahara, family head of Ko #1388 Kawajiri-machi, Kamo-gun.

Reported of marriage of Akira Morimoto on June 22, 18th year of Showa (1943), and entered into the family census record on the same date.

(Blank space following.)

Yoshiko

1st daughter of Akira Morimoto (father) and Toshiko Morimoto (mother).

Born June 22, 19th year of Showa (1944).

Born at Kyoju, Botsuri-ken, Toman-so-sho, Manchukuo on June 22, 19th year of Showa (1944), and reported by father Akira Morimoto. Accepted and entered into the family census record on July 12th of the same year. (Seal.)

(Blank space following.)

Yoji

1st son of Akira Morimoto (father) and Toshiko Morimoto (mother).

Born March 8, 21st year of Showa (1946).

Born at #58 Horiwari-dori 7 chome, Yamato-ku, Anto-shi, Manchukuo on March 8, 21st year of Showa (1946), and reported by father Akira Morimoto. Accepted and entered into the family census record on January 26, 22nd year of Showa (1947). (Seal.)

(Blank space following.)

I hereby certify that this copy is no different from the original deleted family census record.

April 21, 30th year of Showa (1955).

ICHIZO TAKAYAMA,
Deputy Mayor and Acting
Mayor of Hiroshima-shi.
(Seal of Acting Mayor of Hiroshima-shi.)

Received in evidence October 12, 1955.

GOVERNMENT'S EXHIBIT C-3

Permanent Domicile: #1502 Mukai-mura (Translator's note: Underscored may also be read "Muko-mura"), Aki-gun, Hiroshima-ken.

Akira Morimoto—Family Head

4th son of late Tsurukichi Morimoto (father) and late Tomo Morimoto (mother).

Born: April 18, 45th year of Meiji (1912).

Born at #827 N Street, Fresno, California, U.S.A.

Reported by father Tsurukichi Morimoto and received by Consul General Matsuzo Nagai, stationed at San Francisco, on the 27th day of the same month. On June 7 of the same year was sent and entered into the family census record. (Seal.)

Due to the death of Tsurukichi, the former family head, on November 1, 7th year of Showa (1932), reported of the succession as head of family and accepted on the 5th of the same month. (Seal.)

Reported of marriage to Toshiko Nakahara and accepted on June 22, 18th year of Showa (1943). (Seal.)

Transferred the family census record from #1146 Minamo-Senda-machi, Hiroshima-shi and reported by Akira Morimoto and his wife Toshiko. Accepted on May 7, 28th year of Showa (1953). (Seal.)

(Blank space following.)

Toshiko-Wife

1st daughter of Riichi (Translator's Note: Underscored may also be read "Toshikazu") Nakahara (father) and Tomoe Nakahara (mother).

Born June 8, 9th year of Taisho (1920).

Reported of marriage to Akira Morimoto on June 22, 18th year of Showa (1943). Entered into the family census record on the same date from the family census record of Jitsuzu Nakahara of Ko #1388 Kawasuji-machi, Kamo-gun. (Seal.)

(Blank space following.)

Yoshiko

1st daughter of Akira Morimoto (father) and Toshiko Morimoto (mother).

Born June 22, 19th year of Showa (1944).

Born at Kyoju, Botsuri-ken, Toman-so-sho, Manchukuo on June 22, 19th year of Showa (1944), and reported by father Akira Morimoto. Accepted and entered into the family census record on July 12th of the same year. (Seal.)

(Blank space following.)

Yoji

1st son of Akira Morimoto (father) and Toshiko Morimoto (mother).

Born March 8, 21st year of Showa (1946).

Born at #58 Horiwari-dori 7 chome, Yamato-ku, Anto-shi, Manchukuo, on March 8, 21st year of Showa (1946), and reported by father Akira Morimoto. Accepted and entered into the family census record on January 26, 22nd year of Showa (1947). (Seal.)

(Blank space following.)

I hereby certify that this copy is not different from the original family census record.

May 4, 30th year of Showa (1955).

JUNTARO TANIMURA,
Mayor of Mukai-mura,
Aki-gun, Hiroshima-ken.

(Seal of Mayor of Mukai-mura, Aki-gun.)

Received in evidence October 12, 1955.

Mr. Barshay: Would your Honor like to take a look at the originals now?

The Court: That is C-1, C-2 and C-3. [72]

Mr. Barshay: Correct.

The Court: These are the originals?

Mr. Barshay: Those are the originals, your Honor.

The Court: And as I say, they may be withdrawn upon substitution of photostatic copies.

Mr. Barshay: Thank you.

Now, if your Honor please, I have as the exhibit next in order three Japanese documents, with

translations attached, relating to the Japanese land records covering property owned by Dr. Morimoto and his father in Hiroshima, and I offer them as Defendant's Exhibit D1, 2 and 3, respectively.

The Court: Any objection, Mr. Aten?

Mr. Aten: We would like to have the same opportunity on these as the others.

The Court: Yes. Very well. The documents referred to then, the land records of the Hiroshima property, will be received as Government's Exhibit D-1, D-2 and D-3.

(The documents referred to were marked as Government's Exhibits D-1, D-2 and D-3, and were received in evidence.)

GOVERNMENT'S EXHIBIT D-1

Registration Number
Lot, Building or Machinery Number
#1146

Category—Real Estate Indication

Indication Number—1

Indications

#1146 San-no-wari, Aza Oki, Minami-Senda-machi, Hiroshima-shi (city).

1. Building lot—101 tsubo.

Due to rezoning, the above was transferred from Senda-Machi Registration #1239 on February 15, 9th year of Showa (1934).

(Blank space following.)

Category—Section A (Property Rights)

Ranking Number—1 (Formerly #4).

Particulars.

Accepted on April 29, 13th year of Taisho (1924) as #4116.

According to the transaction of 28th day of the same month of the same year, recorded the acquisition of the property right for the following person:

Tsurukichi Morimoto, #1146 Senda-machi, Hiroshima-shi.

Due to rezoning, the above was transferred from Senda-machi Registration #1139 on February 15, 9th year of Showa (1934).

Ranking Number—2 with 1 Appendix.

Accepted on October 4, 24th year of Showa (1949) as #10587.

Due to succession by inheritance of November 1, 7th year of Showa, recorded the acquisition of property right for the following person:

Akira Morimoto, #1146 Minami-Senda-machi, Hiroshima-shi.

Appendix to #2.

Accepted on May 1, 29th year of Showa (1954) as #10579.

Append the amendment of titleholder as follows: #2597 Redonto Street (or Avenue—Translator's note), Long Beach, State of California.

130

130 MORIMOTO, Akira

REGISTRATION APPROVED
Date
Expires
Consul
Place

Application for Passport
[illegible]
(Indicate whether wife or husband)
[FORM FOR NATIVE CITIZEN]

PASSPORT ISSUED
Date
No.
Fee
Consul
Place

I, Akira MORIMOTO, a Native citizen of the United States, solemnly swear that
I was born at Fresno (City or town) California (State or country)
on April 18, 1912; that I am now residing at 1091 Yoso-machi, Tsukui-gun, Kanagawa-ken, Japan;
that I resided continuously in the United States from 1912-1917, 1919-1924 to 1924, at Fresno, Calif. (City and State)
and that I have resided outside the United States as follows:

(State cause of, and period of residence in each foreign country)			
Japan	from 1917-1919	to	
Manchuria	from 1924	to	1925
Siberia	from 1925	to	1926
Japan (State of residence)	from 1926	to	present

My legal residence is at none in the United States
and I intend to return to the United States to reside permanently, within [months/years]
*I was [married/naturalized] on June 4, 1941 to Toshiko Morimoto nee Nakahara,
who was born at Antoneshi, Manchuria on June 8, 1920; who [was/was not] an American citizen,
and who is now residing at Tsukui-gun, Kanagawa-ken
My father, Tsurukichi MORIMOTO (Change in full), was born at Japan (City or town) (State or country)
on July 17, 1870, and is now residing at (deceased)
My mother, Toso MORIMOTO (Maiden name), was born at Japan (City or town) (State or country)
on November 6, 1877 and is now residing at (deceased)

IF EITHER PARENT WAS BORN OUTSIDE THE UNITED STATES, FILL IN THIS PORTION

My father emigrated to the United States on or about [illegible] 1896, resided continuously
in the United States from 1896-1917; 1919-1924 to 1924, at Fresno, Calif., and was naturalized as a
citizen of the United States before the XXX (Name of court) Court of
at (City and State) on (Month) (Day) (Year)
My mother emigrated to the United States on or about [illegible] 1896, resided continuously
in the United States from 1896-1917; 1919-1924 to 1924, at Fresno, Calif., and was naturalized as a
citizen of the United States before the XXX (Name of court) Court of

AFFIDAVIT TO BE EXECUTED BY A PERSON BORN IN THE UNITED STATES (OF ALIEN PARENTS) WHO IS APPLYING FOR THE FIRST TIME FOR A PASSPORT OR REGISTRATION

(TO BE USED IN LIEU OF FORM No. 2)

I, Akira MORIMOTO, solemnly swear that I last left the United States on Shinyo Maru (Vessel) sailing from San Francisco, Cal. (Port) on February 1924 (Date) accompanied by father and mother and have resided at Kanagawa-ken, Japan since August 1949 I now desire to proceed to the United States, where I expect to reside at 927 C Street, Fresno, California (City) with Mr. Izumi SHIMIZU (Name) who is my brother My father's name is Tsuruichi MORIMOTO and he resides at (deceased) My mother's maiden name was Tsuna KUBO and she resides at (deceased) She resided in the United States from 1896-1917 and 1919-1924 I have the following brothers and sisters:

Name	Date and place of birth	Place of residence
Kaoru MORIMOTO,	December 6, 1897, Hiroshima, Japan	Santa Monica, Cal.
Isamu SHIMIZU,	May 22, 1899, Hiroshima, Japan	Fresno, Cal.

The evidence presented by me to establish my American citizenship was obtained for me by myself whose address is (Street No.) (City) (State) and who is my (Relationship, if any) The following persons in the United States can furnish information concerning my identity and the date and place of my birth:

1. Mr. Kaoru MORIMOTO, 1959 22nd St., Santa Monica, Cal. brother (Name) (Address) (Relationship)
He last saw me at Hiroshima on 1932
2. Mr. Izumi SHIMIZU, 927 C St., Fresno, Cal. brother (Name) (Address) (Relationship)
He last saw me at Hiroshima on 1932

I { have / have not } been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered, or served in, the armed forces of a foreign state; accepted, or performed the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; been convicted by court martial of deserting the military or naval service of the United States in time of war, or of committing any act of treason against or of attempting by force to overthrow, or of bearing arms against the United States.

If any of the above-mentioned acts or conditions are applicable to the applicant's case, a supplementary statement under oath should be attached and made a part hereof.

(To be filed in by applicant who served in a foreign army)

I protested to ..... at .....

on ..... (Date) against being required to enter the .....

A ... to take the oath of allegiance ... as ... (Re-document Card) ...

Ranking Number—3.

Accepted on May 1, 29th year of Showa (1954) as #10583.

According to the transaction of March 17 of the same year, recorded the acquisition of property right for the following person:

Yoshihide Kubo, 1146 Minami-Senda-machi, Hiroshima-shi.

This copy was drawn up according to the Register and I hereby certify that this is not different from the Register.

May 4, 30th year of Showa (1955).

MITSUO MARUTA,

Legal Administrative Office, Hiroshima Bureau of Legal Affairs.

(Seal—Not legible.)

Received in evidence October 12, 1955.

GOVERNMENT'S EXHIBIT D-2

Registration Number
Lot, Building or Machinery Number
#1147-1

Category—Real Estate Indication

Indication Number—1.

Indications.

#1147-1 San-no-wari, Aza Oki, Minami-Senda-machi, Hiroshima-shi (city).

1. Building lot—78 tsubo.

Due to rezoning, the above was transferred from Senda-machi Registration #962 on February 15, 9th year of Showa (1934).

(Blank space following.)

Category A

Ranking Number—1 (Formerly #4).

Particulars.

Accepted on April 29, 13th year of Taisho (1924) as #4116.

According to the transaction of the 28th day of the same month of the same year, recorded the acquisition of the property right for the following person:

Tsurukichi Morimoto, #1146 Senda-machi, Hiroshima-shi.

Due to rezoning, the above was transferred from Senda-machi.

Registration #926 on February 15, 9th year of Showa (1934).

Ranking Number—2 with 1 appendix.

Accepted on October 4, 24th year of Showa (1949) as #10587.

Due to succession by inheritance of November 1, 7th year of Showa (1932), recorded the acquisition of property right for the following person:

Akira Morimoto, #1146 Minami-Senda-machi, Hiroshima-shi.

Appendix 1.

Accepted on May 1, 29th year of Showa (1954) as #10679.

Appended the amendment of the titleholder as follows: #2507 Redondo Street (or Avenue), Long Beach, State of California.

Ranking Number—3.

Accepted on May 1, 29th year of Showa (1954) as #10682.

According to the transaction of March 17th of the same year, recorded the acquisition of property right for the following person:

Kiyohiko Kubo, #1146 Minami-Senda-machi, Hiroshima-shi.

(Blank space following.)

Category B—(Rights other than property rights)

• • •

No. 2.

Accepted on August 12, 10th year of Showa (1935) as #9448.

Due to the discharge on August 9th of the same year, recorded the deletion of the mortgage #1.

(Blank space following.)

This copy was drawn up according to the Register and I hereby certify that this is not different from the Register.

May 4, 30th year of Showa (1955).

MITSUO MARUTA,

Legal Administrative Officer, Hiroshima Bureau of Legal Affairs.

(Seal not legible—Translators note.)

Received in evidence October 12, 1955.

GOVERNMENT'S EXHIBIT D-3

Registration Number
Lot, Building or Machinery Number
#288

Category—Real Estate Indication

Indication Number—1

Indications

#1146 and #1147-1 San-no-wari, Azi Oki, Minami-Senda-machi, Hiroshima-shi.

1. One building—Wooden built, two-story, tile roofing building.

Floor space—37 tsubo, 2 go, 5 shaku.

Second floor—9 tsubo, 5 go.

Map Binder Volume 34, sheet #207.

Due to the rezoning, the above was transferred from Senda-machi Registration #1111 on February 16, 9th year of Showa (1934).

Indication Number—2

Accepted on May 1, 29th year of Showa (1954).

#1146 and #1147-1 (San-no-wari) (Aza-Oki), Minami-Senda-machi, Hiroshima-shi.

Building #266 of Minami-Senda-machi.

1. One building—Wooden built, one-story, tile roofing, dwelling house. Floor space—18 tsubo.

Recorded the alteration of structure and remodelling of the above, due to damages to the building.

(Blank space following.)

Category A

Ranking Number—#1 (Formerly #1)

Particulars

Accepted on September 8, 3rd year of Showa (1928), as #9143.

Recorded the property right for the following person: Tsurukichi Morimoto.

#1146 Senda-machi, Hiroshima-shi.

Due to the reasoning, the above was transferred from Senda-machi Registration #1111 on February 28, 9th year of Showa (1934).

Ranking Number—2

Accepted on May 1, 29th year of Showa 1954), as #10661.

Due to succession by inheritance of November 1, 7th year of the same era, recorded the acquisition of property right for the following person: Akira Morimoto.

#2697 Redondo Street (or Avenue)—Translator's note), Long Beach, State of California.

Ranking Number—3

Accepted on May 1, 29th year of Showa (1954), as #10583.

According to the transaction of March 17th of the same year, recorded the acquisition of property right to the following person: Yoshihide Kubo.

1146 Minami-Senda-machi, Hiroshima-shi.

(Blank space following.)

This copy was drawn up according to the Register and I hereby certify that this is not different from the Register.

May 4, 30th year of Showa (1955).

MITSUO MARUTA,

Legal Administrative Officer, Hiroshima Bureau of Legal Affairs.

(Seal—Not legible—Translator's note.)

Received in evidence October 12, 1955.

Mr. Barshay: These are the originals of the land records covering the Hiroshima property (handing).

The Court: Mr. Barshay, I notice in Defendant's Exhibit D-2, a red line across one section of the first page.

Mr. Barshay: The translator explained to me that that is exactly at it appears on the original, it is made a matter [73] of record by the keeper of the records in Japan.

The Court: Well, then, the originals of Exhibits D-1, D-2 and D-3 may be withdrawn upon substitution of photostatic copies.

Mr. Barshay: Now, if your Honor please, the final exhibit in this group is a document in Japanese, with English translation attached, entitled "personal history statement," constituting an official extract of the records of his military service, and I offer it.

The Court: Is that one document?

Mr. Barshay: Same document, your Honor, Japanese document with English translation attached, and I offer this as Defendant's Exhibit E.

Mr. Aten: May it be received with the same understanding?

The Court: Yes, that will be received with the same understanding, that the plaintiff may explain or interpret the document. It will be received as Defendant's Exhibit E. And the original may be withdrawn upon substitution of a photostatic copy. May I see the original of that military document?

(The document referred to was marked Defendant's Exhibit E, and was received in evidence.)

GOVERNMENT'S EXHIBIT E

Personal History Statement

Official Title at time of retirement, full name and seal:

Army Medical Captain,
Akira Morimoto.
(Born April 18, 45th year of Meiji (1912).)
Graduated from Nihon Medical College.

Oct. 10, 13th year of Showa (1938)
Given the rank of sergeant, Medical Corps. Entered the Imperial Guards 1st Infantry Regiment as Medical Officers Candidate.

Nov. 10, 13th year of Showa (1938)
Advanced to the rank of staff sergeant, Medical Corps. Ordered Probationary Officer, Medical Corps.

Dec. 15, 13th year of Showa (1938)
First Lieutenant, Medical Corps.

Inserted 2 lines (Attachment)

Dec. 15, 15th year of Showa (1940)
Transferred to the Reserved and on the same dated received Extraordinary Summons Order. 1st Readjustment Section, Repatriation Relief Bureau (Seal—"Yamano").

March 10th, 17th year of Showa (1942)
Captain, Medical Corps.

Dec. 4, 23rd year of Showa (1948)
Repatriated (to Maizuru).

I hereby certify the above to be with no discrepancy.

May 6, 30th year of Showa (1955).

HIROICHI SASAI,
Relief Section Chief, Public Welfare and Labor Department, Hiroshima Prefectural Government.

(Seal of the Relief Section Chief, Public Welfare and Labor Department, Hiroshima Prefectural Government.)

(Page 2)

The above person joined the Army as a Medical Officers Candidate and voluntarily joined according to the Imperial Order #6, dated January 31, 8th year of Showa (1933), titled, "Supplement to the Army Medical Corps Officers and Extraordinary Exceptions to Period of Active Duties."

Furthermore, the said person was transferred to the Reserved and called to the roll prior to the Great East Asia War.

May 31, 30th year of Showa (1955).

CHIEF OF REPATRIATION RELIEF BUREAU,
Welfare Ministry.

(Seal of the Chief of Repatriation Relief Bureau, Welfare Ministry.)

Received in evidence October 12, 1955.

Mr. Barshay: I am sure your Honor will note it, but may I call attention that at the bottom of that there is a statement made to the effect Dr. Morimoto went into the [74] reserve, as he stated, in December, 1940, and called to the roll, which is a little different, I believe, in fact, than being drafted Dr. Morimoto testified.

Mr. Aten: I didn't hear your last statement, Mr. Barshay?

The Court: Miss Schulke, would you read it?

(Record read.)

The Court: You are referring, Mr. Barshay, to Defendant's Exhibit E, to about the middle of that page, where it says December 15, 1940, transferred to the reserve?

Mr. Barshay: That is correct.

The Court: And the same date received extraordinary summons order?

Mr. Barshay: That is correct. The point I wish to make is, I can argue it later, that he was not really drafted, he was already in the army in the reserve and was called up for active duty in view, I believe, of what was the status of Japan's international affairs, the China incident.

Now, if your Honor please——

The Court: Here is the original.

Mr. Barshay: Thank you. I wish to offer as defendant's next exhibit, as Exhibit F, an authenticated copy of United States Department of State documents comprising that Department's file relat-

ing to Dr. Morimoto's application for a passport to return to the United States, made by him in 1949. [75]

The Court: I assume that is all in English?

Mr. Barshay: I think there is a little bit of Japanese writing in Dr. Morimoto's own handwriting, I believe. No, you are right, your Honor, it is all in English.

The Court: Any objection to this document?

Mr. Aten: None to this one, your Honor.

The Court: The document will be received and marked Defendant's Exhibit F.

(The document referred to was marked as Defendant's Exhibit F, and was received in evidence.)

GOVERNMENT'S EXHIBIT F

American Consular Service
Yokohama, Japan

Memorandum of Issuance of

( ) Service Passport.
(X) Card of Identity and Registration.
( ) Certificate of Identity and Registration.

(Reference, Foreign Service Regulations XXI-2, Note 50a, and XXI-3, Note 16, paragraph h.)

To whom issued: Akiko Morimoto.

Date of issue: April 14, 1948.

Number: 1717.

Valid to: January 26, 1950.

Date of application on which based: January 26, 1948.

Included in registration of Toshiyuki Morimoto.

[Stamped]: American Consular Service.

Japan (Country of nationality) from 1948 to present

My legal residence is at none in the United States

and I intend to return to the United States to reside permanently, within ... (months/years)

*I was [married/remarried] on June 4, 1941 to Toshiko Morimoto nee Nakahara,

who was born at Anton-shi, Manchuria on June 8, 1920; who [is/is not] an American citizen,

and who is now residing at Tsukui-gun, Kanagawa-ken

My father, Tsurukichi MORIMOTO (Name in full), was born at Japan (City or town) (State or country)

on July 17, 1870 and is now residing at (deceased)

My mother, Toko MORIMOTO (Maiden name), was born at Japan (City or town) (State or country)

on November 6, 1877 and is now residing at (deceased)

IF EITHER PARENT HAS BEEN CITIZEN OF THE UNITED STATES, FILL IN THIS PORTION

My father emigrated to the United States on or about ..., 696; resided continuously in the United States from 1898-1917;1919-1924 to 1..., at Fresno, Calif., and was naturalized as a citizen of the United States before the XXX (Name of court) Court of ...

at (City and State) on (Month) (Day) 1... (Year)

My mother emigrated to the United States on or about ..., 696, resided continuously in the United States from 1898-1917;1919-1924 to 1..., at Fresno, Calif., and was naturalized as a citizen of the United States before the XXX (Name of court) Court of ...

at (City and State) on (Month) (Day) 1... (Year)

I request the inclusion of my wife XXX (Name in full), 1...;

She acquired citizenship through ...

I request the inclusion of my minor children as follows:

XXX (Name in full), born at ... (Place and State or country) on ... (Date), 1...

..., born at ... on ..., 1...

..., born at ... on ..., 1...

See Supplement

I [have/have not] been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered, or served in, the armed forces of a foreign state; accepted, or performed the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; been convicted by court martial of deserting the military or naval service of the United States in time of war, or of committing any act of treason against or of attempting by force to overthrow, or of bearing arms against the United States.

If any of the above mentioned acts or conditions are applicable to the applicant's case, a supplementary statement under oath should be attached and made a part hereof.

*A woman applicant who has been married more than once should give name and place of birth of each husband, date of each marriage, and date of termination of previous marriages, whether by death or divorce. The same information relating to living or deceased children of the applicant should be set forth in a separate statement which will be considered a part of this application.

The evidence presented by me to establish my American citizenship was obtained for me by myself

..... whose address is .....
(Street No.) (City) (State)

and who is my ..... The following persons in the United States can furnish
(Relationship, if any)

information concerning my identity and the date and place of my birth:

1. Mr. Kaoru MORIMOTO, 1959 22nd St., Santa Monica, Cal. brother
(Name) (Address) (Relationship)

He / ~~She~~ last saw me at Hiroshima on 1932

2. Mr. Isumi SHIMIZU, 927 F St., Fresno, Cal. brother
(Name) (Address) (Relationship)

He / ~~She~~ last saw me at Hiroshima on 1932

I { have / ~~have not~~ } been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered, or served in, the armed forces of a foreign state; accepted, or performed the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; been convicted by court martial of deserting the military or naval service of the United States in time of war; or of committing any act of treason against or of attempting by force to overthrow, or of bearing arms against the United States.

If any of the above-mentioned acts or conditions are applicable to the applicant's case, a supplementary statement under oath should be attached and made a part hereof.

(To be filled in by applicant who served in a foreign army)

I protested to ..... at .....

on ..... against being required to enter the .....
(Date)

Army (or to take the oath of allegiance to .....) as shown by the documentary evidence

submitted herewith: .....

I was discharged from the army on December 8, 1948

I { am / ~~am not~~ } married. My { husband's / wife's } name is Toshiko MORIMOTO nee Nakahara

and { I / ~~I~~ } was born on 8th day of June, 1920 at Anton-shi, Manchuria

and { I / ~~I~~ / she } resides at 1091 Yose-machi, Tsukui-gun, Kanagawa-ken.

During my residence in the United States I resided at 927 F Street, Fresno, Cal.

and attended school at the following institutions: Lincoln Grammar School, 1919-1924
(Give the names of such institutions and the years it was attended, as 1916, 1917, etc.)

I was baptized at XXX
(Name of church) (City) (Month and year)

Akira MORIMOTO
(Signature)

AMERICAN FOREIGN SERVICE AT Yokohama, Japan

Sworn to before me this 14th day of October 1949

[SEAL]
(Title of officer)

Vice Consul of the United States of America.

Opinion of Officer Taking Affidavit

The officer before whom the affidavit is made should see that the pertinent facts and circumstances regarding the applicant are fully and correctly set forth in the affidavit and application. If, for any reason, they are not so stated the officer should complete them in the space below, adding such comment or opinion as is appropriate. He should also state briefly what examination he made to satisfy himself that the applicant is the person named in the birth evidence submitted. If citizenship acquired by birth in the United States was lost and the applicant subsequently acquired American citizenship, such as by taking the oath of repatriation, the changes necessary to bring out that fact should be made on the form. Such comments as may be necessary to identify the applicant's status should be made by the officer before whom the form is executed.

April 6, 1950.

Applicant was born in the United States, as indicated by the attached California birth certificate. Identity established by affidavit of United States citizen resident in the United States and by certificate of identity issued by local police authorities.

Also attached is applicant's supplementary statement regarding his citizenship application.

Applicant acquired Japanese nationality automatically at birth in 1912 and appears to have retained it since that time.

Applicant served in the Japanese army as a doctor from October 10, 1938, to December 4, 1948. He volunteered for service in 1938, he has stated in writing, because he was subject to conscription as an ordinary soldier having passed the required examination and because by volunteering as a doctor he appeared eligible for more favorable conditions and possibly a shorter term of service. It appears that applicant was at no time after his entry into the army able to leave the service and that his service was continuous from 1938 to 1948, when he was demobilized after three years internment in Siberia.

It is the opinion of this office, which has examined this application carefully and received a report that there is no unfavorable information regarding applicant in the files of local United States investigative agencies, that applicant did not lose United States citizenship under Section 401 (c) of the Nationality Act by reason of service in the Japanese army continuing on and after January 13, 1941 (Passport Code No. 4.2c), and that he has performed no other act causing loss of United States citizenship.

Applicant's two brothers are in the United States. He speaks little English and the oath of allegiance was administered in Japanese.

Because applicant volunteered and served in the Japanese army, his passport application is respectfully referred to the Department for decision, even

though it appears that he did not by such service lose his claim to United States citizenship.

/s/ R. B. FINN,
American Vice Consul of the United States of America in and for Yokohama, Japan.

Enclosures:

1. Birth Certificate.
2. Supplementary Statement.

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SUPPLEMENT TO [illegible] FORM OR File (This form must be filled out completely and presented at the time of apprehension)

1. Last name [illegible] First name [illegible] Middle name [illegible]

2. Present address [illegible]

3. Height 1.66 m. Weight 60 Kg. Color of eyes: Black Color of hair Black

4. Date of birth April 15, 1914 Place of birth 827, F.st. Fresno, Calif.

5. Places of residence since January, 1941: (Use complete addresses)

(Month)	(Year)	(Ken, Fu, To, or Dō)	(Gun)	(Machi)	From	To
1. Jan.	1941	- Japanese Army Troops (Infantry 89 th Regiment) Hoan, Manchuria.				
2. Nov.	1941	- Mukden Army Hospital. Mukden, Manchuria.				
3. July	1945	- 120 th Division Field Hospital. Mudanjan, Manchuria.				
4. Dec.	1945	- Arrived Maizuru & Demobilized.				
5. Mori-						
6. present Aug.	1949	- Mori-Kawajiri-Machi, Kamo-gun, Hiroshima-Ken.				
6. Present		- 104 Yose-Machi, Kubo-Gun, Kanagawa-Ken.				

6. Complete record of all activities since leaving the United States. Give complete names and addresses, and inclusive dates, for all schools, places where employed, and other activities, whether full or part-time. In the case of employment, give also the name of your position. Include army, navy, hotel, private duty, tailoring, city, and other forms of involuntary employment. This record must cover the entire period since leaving the United States; if you were unemployed at any time, so indicate.

Position	Full name	(Street & employer or school)	(City)	From	To
1. Feb.	1924	- Arrival in Japan.			
2. Mar.	1925	- Graduated Minami Grammar School.	(Hiroshima-Shi)		
3. Mar.	1930	- Graduated Sanyo Middle School.	"		
4. Mar.	1938	- Graduated Nippon Medicale College	Tokyo		
5. April	1938 Oct. 1938	- Nippon Red Cross Hospital.	Tokyo		
6. Oct.	1938 Dec. 1948	- Japanese Armed Forces.			
7. Jan.	1949	- Home (without occupation)			

9. (a) Japanese process does not originally; the following is a complete [illegible] of all the particulars thereto relating to [illegible]:

[illegible] April 1942 at my Father's farm village.
At that time my age was 1 of yrs.

9.I [illegible] served in the Japanese armed forces, as evidence of which I produce the following documents:

Refer separate Certification.
(I send the certification at your office on July 18, 1947)

10.I [illegible] have served vote in a political election in Japan, as evidence of which I produce the following documents:

Refer separate certification.

11. Character references. (Give the names and addresses of up to five persons not employers or relatives, who know you well and can testify to your character and activities)

[illegible]

1. Kitaro Ishii [illegible]
2. Tokujuro Kuriyamki [illegible]
3. Kazuki Shibuya [illegible]
4. Shushiro Kido [illegible]

14. Remarks. (Use this space for additional information relating to above item, or for other pertinent information.

Mr. Barshay: There is a little bit of Japanese, I believe it is in Dr. Morimoto's handwriting. It relates to his schooling in Japan.

The Court: Well, the original of Defendant's Exhibit F may be withdrawn upon substitution of a photostatic copy. I assume that is the original that I have?

Mr. Barshay: Yes, your Honor.

Finally, your Honor, my government's last exhibit, G, I want to offer a telegram received in my office yesterday, which was mailed to me and received by me this morning. It is a telegram from the American Embassy in Tokyo to the State Department in San Francisco for delivery to me, and it was sent in response to a request I made to our representative in Tokyo for information from the Nippon Medical College and the Red Cross Hospital in Tokyo, with respect [76] to their records insofar as they relate to Dr. Morimoto's addresses at the time he attended those institutions. They confirm, I believe, what Dr. Morimoto testified to earlier today, and I offer them for that purpose. I think they are perhaps a little bit clearer, the information contained here is a little bit clearer than Dr. Morimoto gave us this morning. If Mr. Aten has no objection I would like to have it made a part of the record.

Mr. Aten: Well, if it is true that this confirms the testimony he gave concerning it, I don't see that we could have any objection.

The Court: Have you had a chance to see it?

Mr. Aten: I didn't check the actual places with it.

The Court: Well, let's take a little recess at this time, and you check it during the recess.

Mr. Aten: Well, I don't really care to check it further at this time. I am willing to take Mr. Barshay's statement about that, but I did want to point out, I did look at this and I notice that it states the hospital's doctors registry book of 1950 and one for 1955 include Morimoto, and give such and such places as his address, showing the source of the information is probably taken from what we would call our city directory, and how much it would be worth.

The Court: In other words, your position is that since 1950 he has been in this country? [77]

Mr. Barshay: I concede that.

Mr. Aten: It shows on its fact that it is inaccurate. I hope it is accurate insofar as his admission is concerned.

The Court: You check that during the recess, and we will have a short recess before making the ruling.

(A short recess was taken.)

Mr. Barshay: May I finish with this?

With respect to my proposed Exhibit G, Mr. Aten and I have agreed that it may go in, with this statement, that the final sentence of the telegram, which reads, "Hospital's doctors' registry book of 1950 and one for 1955 include Morimoto and give Yase-Machi, Tsukui-Gun Kanagawa-Ken as his

address," are not responsive to my request and may be disregarded.

Mr. Aten: No, I didn't say that. I said we didn't want to strike that out, we want to leave it in there.

Mr. Barshay: We are willing to have it in. I want to have it noted that it is not responsive to what I asked for.

The Court: Very well. In view of the statements of counsel, the telegram will be received in evidence and marked Defendant's Exhibit G.

Mr. Barshay: I may state that I have no copy of this. I would like to take the original and supply the court with a copy.

(The document referred to was marked as Defendant's Exhibit G, and was received in evidence.) [78]

The Court: I was wondering, is it a long telegram?

Mr. Barshay: No, it is quite short.

The Court: Well, I always hesitate to permit the withdrawal of original documents unless copies are substituted, but I assume you are down without stenographic service.

Mr. Barshay: Yes. I can have it made out as soon as I get back to San Francisco, and mail it to the Clerk immediately.

The Court: You have no objection?

Mr. Aten: I have no objection. If Mr. Barshay wants to drop into our office when we finish here——

Mr. Barshay: I am hoping to catch a train.

Mr. Aten: We have no objection. We don't attach any importance to the document except it shows some inaccuracies, and Mr. Barshay has already stated it confirms what the witness has stated as to the residence.

The Court: Well, then, you may be permitted to take the original, and forward two, one for filing in the place of the original, and one for the Court's file, and a copy to Mr. Aten.

Mr. Barshay: Yes, I will send one to Mr. Aten also.

That concludes, if your Honor please, the presentation of the government's direct case.

The Court: May I inquire, Mr. Barshay, are there any special matters in these various exhibits to which you [79] particularly desire to direct the Court's attention.

Mr. Barshay: I would like to do that at length in a memorandum of law, if I may. I think it would be simpler and clearer, if I were to do so.

The Court: That is satisfactory.

Mr. Barshay: I should mention one other thing: The attitude of the State Department toward Dr. Morimoto, particularly with relation to its issuance of a return passport in 1950, I think is very important, their policy in such cases. I don't have evidence on it, because I don't think it is necessary, but I think the Court should take judicial notice of the State Department policy in the matter. Those I will discuss in my trial memorandum also, but I can state in general what I have in mind, if you care to hear me on it.

The Court: Well, the Court realizes that it must take judicial notice of many matters of which it has no personal knowledge, and the Court is not informed personally as to the State Department's policies in these matters, and I am not advised that is a matter of which the Court can take judicial knowledge, but if you feel that the Court can take judicial knowledge of it, then I think you should in your brief support that with authorities.

Mr. Barshay: Oh, yes, I will.

The Court: But I would be interested in having you [80] outline briefly what those policies are that apply.

Mr. Barshay: My chief point in that connection would be this, your Honor, the question arises as to why the State Department issued a passport permitting Dr. Morimoto to return to the United States, when it had before it his own statement that he had volunteered for service in the Japanese army. Under ordinary circumstances that would constitute expatriation, loss of his United States citizenship, if he did it voluntarily. Also he took an oath of allegiance to the Emperor of Japan, which he concedes he did, which would also serve to expatriate him.

The policy of the State Department, however, as I think I will be able to establish, was in a case of dual nationals where the applicant was a citizen not merely of a foreign power, Japan, but also a citizen of the United States by birth, was to determine whether or not after, or a short time before the war broke out between Japan and the

United States it were possible for him to have avoided further military service in the Japanese army. If it concluded that he could not have avoided military service, then it was the view of the State Department that he did not expatriate himself. They phrased it this way, that he had overcome the presumption of expatriation, and upon that basis they issued his passport to him.

However, they found it not necessary to go into, nor [81] did they regard it as a standard by which to judge to obtain a passport to inquire into how he got into the army in the first place, whether he volunteered or was drafted into the army in the first place. They simply limited themselves to the question of whether, I believe in January of 1940, it was possible for him to have gotten out of the army, once in, and having determined in Dr. Morimoto's case he could not have gotten out, they said he had overcome the presumption and was not expatriated, and they paid no attention to the question of where his residence or domicile was. That was not regarded as an element by the State Department; all that mattered for them to know was was it possible for him to get out of the army in January, 1940.

The Court: You mentioned, I think, and Mr. Morimoto so testified, and it appears in the responses to the request for admissions, that he did take the oath of allegiance to the Emperor of Japan. I don't know that I have a record as to when that oath was taken.

(Testimony of Dr. Akira Morimoto.)

Mr. Barshay: I don't want to speak for Dr. Morimoto, but I think it was at the time he actually donned the uniform of a Japanese medical officer, which was in October of 1938, was it?

The Witness: May I explain that?

Mr. Barshay: Did you? [82]

The Court: First, Doctor, answer the question: Did you at any time while you were in Japan take the oath of allegiance to the Emperor of Japan? Did you or did you not?

The Witness: Not in the sense of swearing like in this country, not in that sense.

The Court: But you did it in accordance with the custom in Japan?

The Witness: Yes, just as the customary rite.

The Court: In other words, you, whatever it was, an oath or an affirmation or a statement or a declaration, it was what other persons in your same position did? Is that right?

The Witness: Yes, that is right.

The Court: Now, when was that?

The Witness: Almost every day; that is just custom.

The Court: But when was the first time?

The Witness: No, we don't have those swearing rite, formal rite.

The Court: I know, but you said according to the custom.

The Witness: Yes.

The Court: You in effect declared your allegiance to the Emperor most every day?

(Testimony of Dr. Akira Morimoto.)

The Witness: Yes.

The Court: Well, now, you arrived in Japan in 1924?

The Witness: Yes. [83]

The Court: I want to know when is the first time that you made such act or declaration, or performed such custom?

The Witness: After I entered the army as a candidate of medical doctor.

The Court: In other words, that was in 1938?

The Witness: Yes, that is right.

The Court: You didn't make such declaration or perform such act at the time you submitted for physical examination and secured the deferment to permit you to continue your medical education?

The Witness: No, not at that time. But this is just a reading the sentence as to profess our loyalty, and everybody have to do that every morning, just as we pledge our——

The Court: Allegiance to the Flag?

The Witness: That's right, just the same, formal rite, that is all.

The Court: Well, but that isn't done, of course, by tourists over there, people traveling, visiting Japan?

The Witness: Yes.

The Court: Do they do the same thing?

The Witness: No, that is only customary in the army.

The Court: Do you have any further explanation to make?

(Testimony of Dr. Akira Morimoto.)

The Witness: No. Just I want to explain the solemn swear, it is the customary rite.

The Court: Yes. In other words, it isn't the oath that [84] is taken in this country?

The Witness: No, not in the same of this country.

The Court: But you did what the other people over in Japan did?

The Witness: That is right.

Mr. Aten: This was in the nature of a salute to the flag, was it?

The Witness: In a sense the same thing, I believe. Just to keep our morale up, that is all.

Mr. Barshay: Was there any Japanese flag present when you did that?

The Witness: Not necessarily.

Mr. Barshay: Then it wasn't a salute to the flag, was it?

The Witness: Not in that sense.

Mr. Aten: If the Court please, we haven't had the time to go through this more or less voluminous offering of documents, but there are two or three matters that Dr. Morimoto has picked up and called my attention to, and I would like to ask him about those.

The Court: May I have the exhibits? Would you designate the number?

where employed, no other activities, whether full or part-time. In the case of employment, give also the name of your position. Include any Army Reserve, Enemy Military, Civil, and other forms of involuntary employment. This record must cover the entire period since leaving the United States if you were unemployed at any time, so indicate.

Position	Full name and address of employer or school	From	To
1.	Feb. 1924 - Arrival in Japan.		
2.	Mar. 1935 - Graduated Minami Grammar School. (Higashinada)		
3.	Mar. 1930 - Graduated Seayo Middle School.		
4.	Mar. 1938 - Graduated Nippon Medicale College	Tokyo	
5.	April 1938 - Nippon Red Cross Hospital.	Tokyo	
	Oct. 1938		
6.	Oct. 1938 - Japanese Armed Forces.		
	Dec. 1948		
7.	Jan. 1949 - Home(without occupation)		
	Till Now		

9. I (have) (have never) been employed under a foreign government or political subdivision thereof; if so, I give below the full and exact details of the position held, and the evidence I present to show that serving the interests of such country was not a requirement for the position I held.

None.

(over)

11. Character References. [Give the names and addresses of up to five persons who are not relatives, who have known you well for [illegible] years and who could be addressed with confidence.]

5. [illegible]

1. Hideo Ishii [redacted]

2. Takejuro Kuriyama [redacted]

3. Kaoru Shibuya [redacted]

4. Shinshiro Kido [redacted]

12. Remarks. [Use this space for additional information relating to [illegible] or for other pertinent information.

[illegible]

Present Address [redacted]

[illegible]

I solemnly swear that the foregoing answers are true, complete and correct to the best of my knowledge and belief, and to anything stated upon information and belief I do so with the understanding that the truth of all statements made therein is still to be ascertained, and if found incorrect, intentionally or otherwise, in any particular, I may be tried under Ordinance No. 1 (Control) for perjury.

[signature]

Subscribed and sworn to before me this 11th day of October 1945.

[signature]

Received in evidence October 12, 1945

(Testimony of Dr. Akira Morimoto.)

Redirect Examination

By Mr. Aten:

Mr. Aten: The document dated June 30, 1955, I think is the first one offered. [85]

The Court: That is Government's Exhibit B?

Mr. Aten: Yes, on the second page of that document, under property description, the "C" division.

A. Yes.

Q. (By Mr. Aten): It reads "Two story wood building with tile roof. Book store included." What is your explanation of that, Doctor. I believe you testified this morning there was no such thing.

A. I was surprised to find this book store, where this book store came in. It is just a simple mistake of just translation of Japanese language. That book is the same, we use the book as a main in Japanese, same word. That means the main building. They translate it as a book store.

Mr. Barshay: There was a building there?

The Witness: That way I was surprised.

Mr. Barshay: I am sorry, I didn't realize that.

The Witness: That means main building.

Q. (By Mr. Aten): These two properties mentioned were the two lots on which the building was constructed?

A. No, it is one property, one premises.

Q. Yes.

A. And this 7180 is the garden and 7280 is where the building stands. [86]

(Testimony of Dr. Akira Morimoto.)

The Court: Then what is "C", is that a description of the building?

The Witness: That is wrong translation.

The Court: Yes, I understand, but was there a two-story building?

The Witness: Yes.

The Court: That covered——

The Witness: 78.

The Court: ——78?

The Witness: That is correct.

The Court: I see.

Q. (By Mr. Aten): Now, on the first page of that same exhibit, Doctor, is this statement under No. 2, "The Japanese Government records show that the Subject volunteered for military service".

A. Yes.

Q. What have you to say about that?

A. This is the same trouble with Japanese language this morning I explained. We use "volunteer" the word "volunteer" in Japanese, but this word is very ambiguous, and the true meaning is "choice". I took the choice, but in the Japanese language we use the same sort of language and it became very ambiguous.

The Court: You are referring, Mr. Aten, to the statement [87] under paragraph 2 on page 1?

Mr. Barshay: Page 1 of the same exhibit.

The Court: Government's Exhibit B?

Mr. Barshay: Yes.

The Court: And your statement is that you exercised your choice, instead of volunteered?

(Testimony of Dr. Akira Morimoto.)

The Witness: That is right.

Mr. Aten: In this document, Doctor, which I believe was one of many that were in the second exhibit, it is the personal history statement——

The Court: Well, are you talking about the personal history statement in Government's Exhibit E?

Q. (By Mr. Aten): At the bottom of the first page of that history, we have this statement: "The above person joined the Army as a Medical Officers Candidate and voluntarily joined according to the Imperial Order #6," and so forth. That word "voluntarily joined" is there again.

A. Yes. That is the same mistranslation, and I gave the whole explanation this morning, I believe. I was conscripted and I have to take the choice, and I took that doctor choice, and they mean that as a volunteer in here, but that is not the true volunteer, but only choice.

Q. And that is true wherever the word "volunteer" appears?

A. Wherever volunteer, that is the Japanese meaning. [88]

Mr. Barshay: May I ask a question there, your Honor? If it was the intention of the writer to say "volunteer" would he use any other word in the Japanese language?

The Witness: No, we use the same word.

Mr. Barshay: Thank you.

Q. (By Mr. Aten): Aren't there enough words in the Japanese language?

A. Well, I think custom, idiom, custom there.

(Testimony of Dr. Akira Morimoto.)

Q. This exhibit is the one which refers to a description of the property and permanent domicile; I think it is in that same group, if the Court please, but I am sorry, I don't have the number.

Mr. Barshay: Would you like to look at mine?

Mr. Aten: For the purpose of identifying it for the Court.

The Court: Now, the domicile records are Defendant's Exhibits C-1, C-2 and C-3.

Mr. Barshay: That is C-3, permanent domicile.

The Court: Just wait until I get it. Yes, I have C-3.

Mr. Aten: And referring to the photostatic copy, the top page of that document, which is in Japanese.

Q. Doctor, will you explain the symbols, the Japanese at the top on the right hand side, those two designations and then follow it with an explanation of what is below?

A. Yes. In this document the first column is the [89] caption.

Q. That is the first column at the right?

A. Yes. And here is written the true domicile, true domicile.

Q. This is two words?

A. True domicile.

The Court: True?

The Witness: True domicile. And this is to discriminate with the present residence and the permanent residence.

(Testimony of Dr. Akira Morimoto.)

Q. (By Mr. Aten): The same as we would say permanent address?

A. Yes, and present address. So this column always show the true residence, that means true residence. And under this column there is the previous head of the household, and present head of the household, and forth forth; wife, children, and in this column they register all the personal matter, about the personal matters or history, whether marriage or birth, these kind of affairs they register in this column, and they call this the family record.

Q. Now, it is of the entire family?

A. Yes, entire family, and where the head of the family lives makes their own register in the city or village.

Q. So when the words "permanent domicile" are used in these documents in this translation, just what does it [90] mean in the Japanese language?

A. Well, at that particular period he registered as a resident of that family or city, so if I want to move to another city I can change the permanent residence. Then the official of the city or village have to send the whole paper to the new office.

Q. It refers to residence?

A. That's right, residence, and always to keep the record of the residence of the city.

Q. That is what they call permanent domicile?

A. That is what they call true residence.

The Court: Well, I don't know that I completely understand the explanation.

The Witness: Yes.

(Testimony of Dr. Akira Morimoto.)

The Court: Now, in Exhibit C-3, I don't see anything offhand—just a minute, Mr. Morimoto. I don't see anything offhand in the translation of Government's Exhibit C-3 that refers to permanent domicile in the translation.

Mr. Aten: The only thing is the very top.

The Court: Oh, at the left, permanent domicile.

Mr. Aten: I don't know that it occurs any place else.

The Court: All right. Now, that permanent domicile was 1502 Mukai-ura in Hiroshima?

The Witness: Yes.

The Court: Now, is that where your parents were living [91] at that time?

The Witness: Not necessarily, they have to live over there. They keep the record over there but they can move around. And, well, at that time they were not living in this place, they were living in Hiroshima city, and were they register is Mukai-ura, that means Mukai village, that is in Hiroshima prefectorate, so——

Mr. Barshay: May I ask a question at this point?

The Witness: Yes.

Mr. Barshay: Let me ask a hypothetical question. Do you understand what I mean, Doctor?

The Witness: Yes.

Mr. Barshay: Suppose you wish, instead of registering the address in Hiroshima city or prefectorate as your permanent domicile under the family census law, you chose to give Washington, D. C., in.

(Testimony of Dr. Akira Morimoto.)

the United States as your permanent domicile, would that have been acceptable to the registry officials?

The Witness: In Japan?

Mr. Barshay: Yes.

The Witness: Yes.

Mr. Barshay: As the place of permanent domicile of the family? Would that have been acceptable, or was it true it had to be a place in Japan, isn't that so?

The Witness: Repeat the question again. [92]

Mr. Barshay: I am sorry. Perhaps I can simplify it. I am trying to find out whether a Japanese citizen——

The Witness: Yes.

Mr. Barshay: ——who was not an American citizen also, just a Japanese——

The Witness: Yes.

Mr. Barshay: ——could have registered a place in the United States as his permanent or true, as you say true domicile of the family, rather than Japan? Would that have been permitted under the Japanese law, do you know?

The Witness: Well, other than the Japanese in Japan they just cancel this, because this is just the paper for record, so if we became American citizens or move the permanent——

Mr. Barshay: In other words, if such a person moved his domicile out of Japan, he would have cancelled his family registry altogether? Is that right?

The Witness: Yes.

(Testimony of Dr. Akira Morimoto.)

Mr. Aten: This is just a record of Japan?

The Witness: Yes.

Mr. Aten: We have another document, Mr. Barshay, and I don't know the number of this. I think it is in the same group.

Mr. Barshay: D-2, your Honor.

Q. (By Mr. Aten): In the typewritten portion of this [93] Exhibit D-2. Doctor, this refers to the title of the property which your father purchased in Hiroshima? A. Yes.

Q. And in the second frame, I believe it is marked "A" here on that page, the statement "Accepted on April 29, 13th year of Taisho (1924)" and shows it was registered to your father?

A. Yes, sir.

Q. Now, the next item following that is "Accepted on October 4, 24th year of Showa (1949)" and it shows there your name, doesn't it?

A. Yes.

Q. 1949. Your father's death occurred in 1952?

A. Yes.

Q. And I believe you testified this morning you were informed that your uncle or some relative went and had this property registered then in your name? A. Yes.

Q. But apparently from the certified copy of the record here it never was registered in your name? A. No.

Q. And this registry of it in 1949 was at the time you came back and sold it? You had been informed it was in your name but it actually was not,

(Testimony of Dr. Akira Morimoto.)

is that correct? A. That is correct. [94]

The Court: Well, Mr. Morimoto——

The Witness: Yes.

The Court: ——did you surrender or sell whatever interest you had in the property in '49, or did you do that after you returned to this country?

The Witness: I sold that property while I was in Japan, but the procedure, the consideration was not to be made at that time, and I was here already, and the one who purchased the property tried to register and find out my name wasn't in there, so I have to explain the whole thing to the Japanese office, and they changed the property to my name, and to the new owner.

The Court: Well, I noticed in the same exhibit under Appendix 1, it is accepted on May 1, 29th year Showa, 1950. "Appended the amendment of the titleholder as follows: #2597 Redonto Street (or Avenue), Long Beach."

The Witness: Yes.

The Court: Was that your address?

The Witness: Right now that is the address of the hospital.

The Court: That was the hospital's address at that time?

The Witness: Yes.

The Court: And the property eventually, the title to it came in the name of Kiyohiko Kubo?

The Witness: Yes. [95]

The Court: And was that your uncle?

The Witness: No, he is the one who bought.

(Testimony of Dr. Akira Morimoto.)

The Court: From your uncle?

The Witness: Yes.

Mr. Aten: The reason we call attention to that was Mr. Barshay thought this morning during his examination that the doctor had gone to the registry and had this property registered in his name, but he didn't remember all the details, but he thought his uncle had done so for him and he found he had not, and this record shows this is a fact.

Those are all that we picked up here. If there is anything further we might call attention to it in the brief.

The Court: Very well.

I noted, Mr. Morimoto, there were two children born to your marriage in Japan?

The Witness: Yes.

The Court: And when were they born?

The Witness: Eldest one is born in 1944, and second one born in 1947, but at that time I was in Siberia so I didn't know it.

The Court: In '44, where were you at that time?

The Witness: In Manchufria.

The Court: Manchuria. Now, did you cause the birth of that child to be registered with the American Consul at any place? [96]

The Witness: No, I didn't make any register to the Amerjcan Consul.

The Court: And did you do so after you learned of the birth of the second child, when you returned to Japan, did you——

The Witness: No.

(Testimony of Dr. Akira Morimoto.)

The Court: ——make any record?

The Witness: No.

The Court: Now, I noticed in one of these exhibits that when you were born in Fresno——

The Witness: Yes.

The Court: ——that your father——

The Witness: Yes.

The Court: ——registered your birth with the Japanese Consul?

The Witness: Yes.

The Court: And the family records in Japan were——

The Witness: Put into the record.

The Court: The fact of your birth?

The Witness: That is right.

The Court: Now, as I understood your testimony earlier, when you were directed to take this physical examination——

The Witness: Yes.

The Court: There was no indication or threat of war of any kind?

The Witness: No, at that time, no. [97]

The Court: And that state of tranquility continued——

The Witness: Yes.

The Court: ——up until after you were in the service as a physician, as a surgeon, is that true? Or do you understand that?

The Witness: No, I didn't get it.

The Court: I will reframe it. When you became a medical cadet——

(Testimony of Dr. Akira Morimoto.)

The Witness: Yes.

The Court: ——which I understand was in 1938, I believe?

The Witness: Yes.

The Court: Were there any hostilities or any indications of war?

The Witness: No, I didn't recall any.

The Court: There had been some incidents though, had there not, before that?

The Witness: Only the Manchuria incident; that was way ahead of that time.

The Court: Yes.

The Witness: And Manchuria was already added to the Japanese government, under the government, and besides that there was not any.

Mr. Barshay: I just want to clarify something in my own mind, I am not too sure. Coming back to something, I am certain you testified to it before, Dr. Morimoto: You [98] were examined——

The Witness: Yes.

Mr. Barshay: ——for a physical fitness——

The Witness: Yes.

Mr. Barshay: ——by the Army——

The Witness: Yes.

Mr. Barshay: ——in what month of 1938?

The Witness: May.

Mr. Barshay: May, 1938. How many months later, and what month was it when you actually entered the service of the Japanese army?

The Witness: October 10th, of the same year.

Mr. Barshay: October 10th of the same year.

(Testimony of Dr. Akira Morimoto.)

And at that time you were 26 years of age, in 1938, is that right? You were born in 1912. 26 years of age?

The Witness: Yes.

Mr. Barshay: And at no time, at that time or any other time, while you were in Japan, did you visit an American Consulate, or the American Embassy in Tokyo, to find out whether you could avoid entering the Japanese army by virtue of the fact that you were an American citizen, claiming residence in the United States? Isn't that true, that you didn't?

Mr. Aten: If your Honor please, we object to that as incompetent, irrelevant and immaterial, because under the [99] law, and we have the authority, it would be a futile act and he was not required to under dual citizenship.

Mr. Barshay: It is one of the most important elements, I think.

The Court: The question was a multiple question, so I think you better reframe it.

Mr. Barshay: Did you at any time before April, 1938, visit at the American Consulate, either in Tokyo, Hiroshima, or any other place in Japan, for the purpose of registering as an America citizen? Yes or no?

The Witness: As I testified before——

Mr. Barshay: Move to strike the answer as not responsive.

The Court: I think the question can be answered yes or no, and then you can make any explanation.

(Testimony of Dr. Akira Morimoto.)

The Witness: No, I didn't visit——

Mr. Barshay: Did you at any time between April and, was it October?

The Witness: October.

Mr. Barshay: ——October of 1938 visit the American Consulate in Tokyo or Hiroshima, or any other place in Japan, to register as an American citizen?

The Witness: No.

Mr. Barshay: Did you at any time prior to April, 1938, visit an American Consulate——.

The Witness: No. [100]

Mr. Barshay: ——any place in Japan for the purpose of registering as an American citizen?

The Witness: No.

Mr. Barshay: The answer is no. That is all.

Mr. Aten: Now give your explanation, Doctor?

The Witness: Yes, as I explained before, it was out of my ignorance, I think. But I didn't know anything about I have to contact with the American Consulate at that time. There wasn't any particular information or row which I didn't know, so I didn't even think about that, but after I finished my education and I have to go to army that was the promise for my education, because if I object getting into the army, well, I couldn't have education either, so I have to omit—to get into army, but in that circumstances if I go to army two years and after that I will be free and I can be able to go any place. That was my figuring or thinking, and that is the reason.

(Testimony of Dr. Akira Morimoto.)

Mr. Barshay: May I ask, did you figure that you might have to, after you served your two years, go into the reserve and be liable for calling up for a further period of service? Did that enter your mind also?

The Witness: No, I didn't think about that.

The Court: Let me ask this question, I don't know how material it is: When were you conscious of the fact that you were an American citizen? [101]

The Witness: When?

The Court: Yes, when was the first time you were conscious of the fact you were an American citizen?

The Witness: Well, I knew I am American citizen, and especially I had the intention of coming back after I went through the medical college.

Mr. Barshay: I move to strike it.

The Court: Well, I will leave it. The point is this: you went to Japan when you were 12?

The Witness: Yes.

The Court: Now, you knew your father and mother——

The Witness: Yes.

The Court: ——were both subjects of Japan?

The Witness: Yes.

The Court: Now, when did you first realize or become aware that you were not a subject of Japan, but had a different status than your parents?

Mr. Barshay: Your Honor, may I object to the

(Testimony of Dr. Akira Morimoto.)

latter portion of the question? He was a subject of Japan.

The Court: I beg your pardon?

Mr. Barshay: He was a Japanese national as well as American. Your Honor is taking something not a fact in evidence.

The Court: Well, I will reframe the question. When did you first become aware of that fact that your status [102] was different than that of your parents?

The Witness: Yes.

The Court: When?

The Witness: Well, I always believed I am American citizen, that was always my belief, but I didn't know about the procedure, what I have to take out a citizenship.

The Court: Any further questions?

Mr. Aten: No, your Honor.

The Court: Any further questions?

Mr. Barshay: Rest, your Honor.

The Court: Well, I have no further questions. [103]

* * *

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of Cali-

fornia, do hereby certify that the foregoing pages numbered 1 to 191, inclusive, contain the original

Complaint;

Temporary Restraining Order;

Order to Show Cause why Preliminary Injunction should not issue;

Motion and Notice of Motion to Dismiss Action together with Points and Authorities;

Amended Complaint;

Stipulation Extending Time to Answer; October 18, 1951, and November 30, 1951;

Motion and Notice of Motion to Dismiss as Barred by Statute of Limitations;

Memorandum of Points and Authorities in Opposition to Motion to Dismiss;

Reply Memorandum of Defendant in Support of Motion to Dismiss;

Notice of Motion to Substitute Defendant;

Stipulation of Substitution of Defendant;

Answer to Amended Complaint;

Supplementary Complaint;

Order Substituting Defendant;

Stipulation Relating to Lack of Prosecution;

Stipulation relating to pretrial hearing;

Admissions and Denials in Response to Request for Admission of Facts;

Plaintiff's Memorandum of Authorities;

Defendant's Trial Memorandum;

Plaintiff's Closing Brief;

Memorandum and Order;

Notice of Motion to Fix Attorneys' Fees;

Findings of Fact, Conclusions of Law and Judgment; (Lodged);

Stipulation Relating to Rents and Amount of Judgment;

Findings of Fact and Conclusions of Law and Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court for September 21, 1951; January 8, 1952; July 1, 1952; July 13, 1953; November 1, 1954; October 12, 1955; April 9, 1956; 1 volume of reporter's transcript of proceedings; Plaintiff's Exhibit 1 and Defendant's Exhibits A through F, inclusive, all in the above-entitled case, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has not been paid by appellant.

Witness my hand and seal of the said District Court this 18th day of July, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15197. United States Court of Appeals for the Ninth Circuit. Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian, Appellant, vs. Akira Morimoto, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed July 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 15197

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, Appellant,

vs.

AKIRA MORIMOTO, Appellee.

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANT

Appellant Herbert Brownell, Jr., Attorney General of the United States, as successor to the Alien Property Custodian, will rely upon the following points on the appeal herein:

1. That the District Court did not have jurisdiction of the action because the action was not instituted within the limitations of time prescribed by Section 33 of the Trading With the Enemy Act, as amended (50 U.S.C. App. 33); and

2. That the District Court did not have jurisdiction of the action because appellee was an enemy within the meaning of Section 9(a) of the Trading With the Enemy Act, as amended (50 U.S.C. App. 9(a)) because

(a) he was resident within an enemy country, namely, Japan, within the meaning of Section 2 of the Trading With the Enemy Act, as amended (50 U.S.C. App. 2), and

(b) he was an officer or agent of the government of a nation with which the United States was at war, namely, Japan, within the meaning

(Testimony of Dr. Akira Morimoto.)

of Section 2 of the Trading With the Enemy Act, as amended (50 U.S.C. App. 2).

3. That the following "Findings of Fact" of the District Court were clearly erroneous in fact and were erroneous as a matter of law:

(a) That the plaintiff duly filed a notice of claim under Section 9(a), of the Trading With the Enemy Act (Finding III), and that it is not true that the action was commenced after the time limited therefor by Section 33 of said Act, and that it is not true that the Court is without jurisdiction of the action (Finding X);

(b) That the service of the plaintiff in the Japanese army after December 8, 1941, was involuntary on the part of the plaintiff, and that plaintiff was not on account of such service or otherwise an officer, official or agent of Japan within the meaning of said Act (Finding VII);

(c) That the plaintiff was not resident within Japan within the meaning of said Act from September 9, 1945, to December 4, 1948, or at the time of the vesting order, December 4, 1947 (Finding VIII);

(d) That the plaintiff was at no time an enemy as defined in the said Act (Finding IX).

DALLAS S. TOWNSEND,
JAMES D. HILL,
GEORGE B. SEARLES,
PERCY BARSHAY,

By /s/ PERCY BARSHAY,
Attorneys for Appellant.

[Endorsed]: Filed July 23, 1956.

Office - Supreme Court, U...
FILED
SEP 4 1957
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 426

MORIZO NAKASHIMA, as executor of the last will of Akira Morimoto, deceased,
Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No.

MORIZO NAKASHIMA, as executor of the last will of Akira Morimoto, deceased,
Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Morizo Nakashima, as executor of the last will of Akira Morimoto, deceased, respectfully prays that a writ of certiorari to the United States Court of Ap-

peals for the Ninth Circuit issue to review the judgment in this case reversing a judgment of the United States District Court for the Southern District of California, Northern Division.

The opinion of the Court of Appeals was reported in 243 F. 2d 787. In the District Court the Honorable Gilbert H. Jertberg, District Judge, wrote an opinion, which was not reported but is set forth in the printed record in this case, pages 13-27, nine copies of which have been filed pursuant to Rule 21(4) of this Court.

JURISDICTION.

The judgment of the Court of Appeals was made and entered on April 5, 1957, and appellee's petition for a rehearing was denied on June 7, 1957. 28 U.S.C. Sec. 1254(1) confers jurisdiction on this Court to review the judgment of the Court of Appeals by writ of certiorari. The ground on which petitioner seeks to invoke the jurisdiction of this Court is one stated in paragraph 1(b) of Rule 19 of this Court, that is, that the Court of Appeals in this case decided an important question of federal law which has not been, but should be, settled by this Court.

QUESTION PRESENTED FOR REVIEW.

Where the property of an American citizen has been seized by mistake under the Trading with the Enemy Act, is such seizure by the United States a

taking of property without due process of law or without just compensation, where that Act denies return of the property solely because claim or suit for return was not filed within two years after such seizure and the Act affords no protection to persons under disability or beyond the seas, and said citizen and most persons affected by that statute of limitations were abroad at the time of enactment thereof and at the time of seizure of the property, and had no notice of such seizure?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Petitioner contends that Section 33 of the Trading With the Enemy Act (50 U.S.C. App. Sec. 33), the statute of limitations above referred to, deprives him of his property without due process of law and takes his property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or prop-

erty, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 33[1] of the Trading With the Enemy Act reads:

"No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from the enactment of this amendment, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to a successor organization designated pursuant to section 32(h) hereof if notice of claim is filed before the expiration of one year from the effective date of this Act. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a

[1]Section 33 added by Public Law 671, 79th Cong., approved August 8, 1946 (60 Stat. 925). Amended by Public Law 370, 80th Cong., approved August 5, 1947 (61 Stat. 784), by Public Law 874, 80th Cong., approved July 1, 1948 (62 Stat. 1218), by Public Law 292, 83d Cong., approved February 9, 1954 (68 Stat. 7), and by Public Law 626, 83d Cong., approved August 23, 1954 (68 Stat. 767).

suit or claim for return pursuant to section 9 or 32(a) hereof."

STATEMENT OF THE CASE.

Akira Morimoto was plaintiff in the District Court and will hereinafter be referred to as plaintiff. He died during the pendency of the case in the Court of Appeals and petitioner, his executor, was duly substituted as a party to the action. The plaintiff was born in Fresno, California on April 18, 1912. His parents were Japanese citizens and they never acquired American citizenship. They resided in this country from 1898 to 1924, with the exception of two years, 1917-1919 (R. 130). Plaintiff was a citizen of both the United States and Japan at all times material to this case (Finding V, R. 31).

Plaintiff was taken by his parents to Japan in 1924. His parents never returned to this country. Prior to 1924, plaintiff had attended grammar school in Fresno, and thereafter continued his education in Japanese schools, completing grammar school and high school in Hiroshima, graduating in 1930. When plaintiff reached the age of twenty years he became subject to compulsory military service in the Japanese Army. He was excused from taking the physical examination because he was attending medical college and was granted a deferment until he completed his medical course. Upon completion of his medical education he reported for duty at an army camp in Tokyo and entered the Army as a medical officer

candidate in October of 1938. He served as a doctor in the Army and was stationed in Manchuria until September 9, 1945, when he was captured by the Russians and taken to Siberia. He was held as a prisoner of war by the Russians until December 4, 1948, when he was released and returned to Japan. Plaintiff was very ill when he was returned to Japan, such illness having been caused by malnutrition during the aforesaid imprisonment; and he returned to the United States, filed claim for the return of his property (land in Fresno) which had been vested under the Trading With the Enemy Act, and commenced this action as soon as he reasonably could (Finding VI, R. 31-32). The vesting occurred December 17, 1947 (R. 29), the claim for the return of the vested property was filed October 17, 1950 (R. 11) and this action was filed on plaintiff's behalf on October 23, 1950 (R. 13). Plaintiff arrived in this country from Japan in December, 1950 (R. 49).

District Judge Jertberg gave judgment for the plaintiff under Section 9(a) of the Trading With the Enemy Act, which confers jurisdiction on the District Courts to order return of vested property to persons who are not enemies as defined in the Act. The Court of Appeals did not rule on the merits of plaintiff's claim, but reversed the judgment on the ground that the period of limitations prescribed by Section 33 of the Act expired December 16, 1949, two years after the vesting of property. Judge Jertberg's opinion (R. 13-27) did not discuss the statute of limitations but he made a finding in favor of plaintiff on

the issue (Finding X, R. 33). With reference to the statute of limitations the following discussion was had between Mr. Aten, counsel for plaintiff, and Mr. Barshay, counsel for defendant, at the opening of the trial (R. 37-38):

> "Mr. Aten . . . But I might ask counsel, Mr. Barshay, if the question of the statute of limitations is to be raised here.
>
> Mr. Barshay. No, it is not, because, if I recall correctly, Judge Beaumont ruled that the statute did not operate to bar the suit, and I presume without appeal that has become the law of the case.
>
> The Court. As I understand, he denied the motion to dismiss.
>
> Mr. Barshay. That is correct, on that ground, so I assume in the absence of appeal that becomes the law of the case. Incidentally, the law has been changed anyway and the time for filing claims has been extended, so that question is moot."

Later in the trial, however, Mr. Barshay reserved the right to raise the question on appeal (R. 82).

In the courts below plaintiff relied on the principle applied in *Hanger v. Abbott*, 6 Wall. 532, 18 L.Ed. 939, that statutes of limitation are tolled by war. About three weeks prior to the time set for the argument of this case before the Court of Appeals, this Court announced its decision in *Soriano v. United States*, 352 U.S. 270, 77 S.Ct. 269, holding that the rule of *Hanger v. Abbott* did not apply as against the sovereign and impliedly overruling the cases relied on by plaintiff. The Court of Appeals thereafter allowed

plaintiff to file a typewritten supplemental memorandum on the statute of limitations issue, but held that this action was barred by the statute and that the 1954 amendment thereto applied only to administrative claims, not to suits. On the constitutional phase of that issue the Court of Appeals said in part:

> "The power of Congress to provide for an immediate seizure in war times of property supposed to belong to the enemy is dependent upon adequate provision being made for its return in case of mistake. Central Trust Co. v. Garvan, 254 U.S. 554, 566. Whether adequate provision for such return has been made depends, among other things, on whether the period of limitation for the bringing of suits for return of seized property is reasonable. Appellee is therefore correct in contending that the reasonableness of the period of limitations presents a constitutional question."

The Court concluded, however, that the two year statute was reasonable.

ARGUMENT.

Petitioner submits that the Court of Appeals did not give proper weight to several material factors, most of which are set forth in the Congressional Committee Reports dealing with the 1954 amendment to Section 33 of the Trading With the Enemy Act. The report of the House Committee, which repeated in substance the Senate Report, said (1954-2, U.S. Code Congressional and Administrative News, pages 1997, 1998):

"Section 33 of the Trading With the Enemy Act of 1917 was added as an amendment to that act on August 8, 1946 (Public Law 671, 79th Cong.). It provided for a limitation of the period within which claims could be filed for the return of vested property. The limitation prescribed was 2 years from the date of enactment of the amendment or 2 years from the date of vesting of the particular property to which claim was being made, whichever date was later.

Within a short time it became apparent that a substantial number of persons were unable to file claims within the statutory limitation originally prescribed and, as a result, Congress enacted Public Law 874 of the 80th Congress, which extended the time for the filing of claims under the act until April 30, 1949, or 2 years from the date of vesting, whichever date was later. Notwithstanding this further extension of time, the question of another extension was raised soon after the expiration of the extended period. *The need for the present legislation revolves around the adequacy of the notice given to claimants of their rights and the adequacy of time within which such claimants could file their claims. Most of the persons whose property has been vested have, for a large part, been located abroad. Thus, while notice was published in the Federal Register, this notice was frequently never communicated to persons with residence abroad.*

. . .

From the evidence before the committee, it is evident that notice of the right to file for the return of property did not come to the attention of a substantial number of interested persons. In

many cases, this was by virtue of the serious dislocations in the world as an aftermath of war. In others, it was because governments were involved in the reconstruction of their devastated countries and were only able to give incidental attention to problems such as these. In still other cases, as illustrated above, the rights of some claimants were not sufficiently ascertainable prior to the deadline in order to enable them to pursue the remedy available to them. It is readily apparent, therefore, that it is both necessary and desirable to permit an extension of time for the filing of claims under the Trading With the Enemy Act so that persons such as those described earlier in the report may seek the return of their property. . . ." (Emphasis added).

McGahey v. Virginia (Ex Parte Brown) 135 U.S. 662, 701-708, 34 L.Ed. 304, 316 shows that considerations of the kind discussed in the above quoted committee report are relevant to determining the reasonableness of a statute of limitations. That case dealt with certain bonds of the State of Virginia, which were usable for the payment of certain state taxes and fines. Some years after issuance of the bonds, Virginia enacted a law limiting the future right to use the bonds for such payment to a period of one year after enactment of the law. The holding that this was unreasonable and unconstitutional was based in part on the fact that (135 U.S. 707-708, 34 L.Ed. 318):

> "These twenty thousand bonds would be likely to be scattered and dispersed through many States and countries, and it would be impracticable for the holders of them to use the coupons

> which the State should fail to pay in cash, in the alternative manner stipulated for in the contract, unless they had a reasonable time to dispose of them to taxpayers."

Similarly, the plaintiff in this case was absent from the United States and did not learn of the vesting of his property until some time after his return to Japan from imprisonment in Russia in December, 1948 (R. 48). Further, it appears from the aforesaid committee report dealing with the 1954 amendment to Section 33, that the occupation authorities gave little or no publicity to the April 30, 1949 deadline prescribed in Section 33 (U.S. Code Congressional and Administrative News, 1954-2, page 1998). Presumably, also, little or no publicity was given to the two year limitation prescribed in Section 33.

An additional factor showing the unreasonableness of Section 33 is that the section does not protect the rights of persons under disability or beyond the seas. Such protection has been incorporated in most statutes of limitation enacted since the year 1623. In *Hanger v. Abbott*, supra, the Court said (6 Wall. 538, 18 L.Ed. 942):

> "When our ancestors immigrated here, they brought with them the Statute of II, Jac. I. ch. 16, entitled 'An Act for the Limitation of Actions, and for Avoiding of Suits of Law,' known as the statute of limitations . . .
>
> Such statutes exist in all the states, and with a few exceptions they have been copied from the one brought here in colonial times . . ."

> Persons within the age of twenty-one years, *femes covert, non compos mentis,* persons imprisoned or beyond the seas, were excepted out of the operation of the 3d section of the act, and were allowed the same period of time after such disability was removed. Just exceptions, indeed, are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence."

Such exceptions are generally applicable in actions against the United States. 28 U.S.C. Section 2401(a) reads:

> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

28 U.S.C. Section 2501 contains a substantially identical provision dealing with Court of Claims actions. The plaintiff, an American citizen, was in a Siberian prison camp when his property was vested on December 17, 1947. He did not get back to this country until December, 1950 (R. 49). His rights would have been protected if Section 33 had included a provision similar to the second sentence of 28 U.S.C. 2401(a) supra (or to the first sentence thereof).

United States v. Greathouse, 166 U.S. 601, 41 L.Ed. 1130, shows that this Court has recognized that the

rights of persons beyond the seas should be protected. In that case a provision similar to the second sentence of Section 2401(a), supra, was by this Court read into the Tucker Act which had superseded but not expressly repealed an act (U.S. Rev. Stat. Section 1069) containing such a provision, the Court saying (166 U.S. 605, 41 L.Ed. 1131):

> "... But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost v. Wenie,* 157 U.S. 46, 58; *United States v. Healey,* 160 U.S. 136, 147.
>
> In conformity with this principle we must adjudge that the above proviso of U. S. Rev. Stat. Section 1069, is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently that the claim of a person who was beyond the seas at the time claim accrued is not barred until three years shall have expired after such disability is removed without suit against the government. Although the act of 1887 prescribes the limitation for suits 'under this (that) act,' without making any exception in favor of persons under disability, it should be interpreted, as if the proviso in U. S. Rev. Stat. Section 1069 were added to Section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics, and insane persons. We are unwilling to hold that Congress intended any such result."

In contrast with the regard shown for the exceptions for persons under disability in the *Hanger* and *Greathouse* cases, it was held in *Vance v. Vance*, 108 U.S. 514, 27 L.Ed. 808, that an exception in favor of minors is not essential to the constitutionality of a State statute of limitations. The Court said (108 U.S. 521; 27 L.Ed. 811):

> "... The exemptions from the operation of statutes of limitation, usually accorded to infants and married women, do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights. No such provision is made here for such exception, but, in place of it, the Legislature has made it the duty of the proper officer of the court to act for them."

We believe that the last sentence of this quotation distinguishes the *Vance* case from the case at bar. In any event, it seems clear that the failure to include the usual exceptions in a statute of limitations is one factor to consider in determining the reasonableness of the statute.

In this respect, Section 33 of the Trading With the Enemy Act is certainly a striking contrast to 28 U.S.C. Sections 2401(a) and 2501, supra, the statutes of limitation generally governing actions against the United States. Those sections allow six years in which to sue and safeguard the rights of persons beyond the seas and under disability, even in cases where the rights to be protected are purely statutory. This is

a case of constitutional right. A remedy under Section 9(a) of the Trading With the Enemy Act is essential to the constitutionality of the act, as the Court of Appeals recognized in this case. Yet Section 33 nullified that remedy in many cases (including this one) for at the time of the adoption of Section 33 in 1946 and the time of the vesting of the property, most people affected by the statute were abroad and frequently had no notice that their property was being confiscated.

The only reason given for the adoption of Section 33 was the desire to wind up the business of the Alien Property Custodian (1946 United States Code Congressional Service, page 1475, the House Committee Report), but we submit that mere convenience is no justification for the confiscation of property. This case comes very close to the second sentence of the following quotation from *Becker Steel Co. of America v. Cummings*, 296 U.S. 74, 79, 56 S.Ct. 15, 18:

> "The seizure and detention which the statute commands and the denial of any remedy except that afforded by section 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the nonenemy owner either the return of his property or compensation for it. See Henkels v. Sutherland, supra; Central Union Trust Co. v. Garvan, supra, 254 U. S. 554, 566, 569, 41 S. Ct. 214, 65 L. Ed. 403; Stoehr v. Wallace, supra, 255 U.S. 239, 246, 41 S. Ct. 293, 65 L. Ed. 604. Plainly inadequate would be a remedy which could be availed of only while the Custodian or Treasurer continued to retain possession of the seized property or its proceeds, and

which would be lost whenever he disposed of the property and proceeds, whether lawfully or not."

Dated, Fresno, California,
August 30, 1957.

Respectfully submitted,

JAMES KUBOTA,
IRVINE P. ATEN,
RICHARD V. ATEN,
Attorneys for Petitioner.

L. NELSON HAYHURST,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit

Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian, Appellant, vs. Morizo Nakashima, Appellee.	No. 15,197 Apr. 5, 1957

Appeal from the United States District Court for the Southern District of California, Northern Division.

Before: Fee and Hamley, Circuit Judges, and Clark, District Judge

Hamley, Circuit Judge:

This is an appeal from a judgment for plaintiff in an action to recover property vested under the Trading with the Enemy Act, 50 U.S.C.A. App. § 1 et seq. Plaintiff Akira Morimoto died after the appeal was filed, and his executor, Morizo Nakashima, now appears as appellee.

Appellant contends that the district court lacked jurisdiction because the action was not brought within the period of limitation specified in § 33 of the act.

The real estate which is the subject matter of the suit vested in appellant on December 17, 1947, when the vesting order was filed with the Federal Register. A notice of claim to the property was filed with the Office of Alien Property, Department of Justice, on October 17, 1950. The original complaint herein was filed October 23, 1950.

The suit was commenced pursuant to § 9 (a) of the act. This statute confers jurisdiction upon district courts to entertain a suit in equity to establish the claimant's right to, and obtain the return of, property seized under the act. Section 33 of the act specifies the time within which notices of claim made pursuant to § 9 or § 32, and suits authorized by § 9, must be filed. Section 33, as it read when the instant notice and suit were filed, is quoted in the margin.[1]

---

[1]Section 33, as amended in 1948:

"No return may be made pursuant to section 9 or 32 [section 9 or 32 of this Appendix] unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 [section 9 of this Appendix] may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof [section 9 or 32(a) of this Appendix]."

It is conceded that, if the section as quoted is controlling, the suit was not timely filed. The two-year period following vesting had expired before either a claim or suit had been filed. Appellee, however, argues that the period of limitation for filing such suits was extended by the 1954 amendment of § 33, and that this suit was filed within the extended period. He also argues that, if the period of limitation was not extended by the 1954 amendment, § 33 is unconstitutional as to him.[2]

Under the 1954 amendment, the first sentence of § 33, relating to notices of claims, was amended to read as quoted in the margin.[3] With respect to property (such as that here in question) acquired by the United States on or after December 18, 1941, the time for filing a notice of claim was extended to February 9, 1955, or two years from the vesting, "whichever is later." It follows that the instant notice of claim,

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[2] An additional contention by appellee that this statute of limitations was tolled on account of war was abandoned after the decision in Soriano v. United States, 352 U.S. 270, decided on January 14, 1957.

[3] The first sentence of § 33 (50 U.S.C.A. App. § 33), as amended in 1954, reads:

"No return may be made pursuant to section 9 or 32 [section 9 or 32 of this Appendix] unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later: except that return may be made to successor organizations designated pursuant to section 32(h) of this Appendix if notice of claim is filed before the expiration of one year from August 23, 1954." 68 Stat. 7, ch. 4; 68 Stat. 768, ch. 830, § 2.

which was filed on October 17, 1950, was timely under the 1954 amendment.

The 1954 amendment, however, made no change in the second sentence of § 33, which relates specifically to the period of limitation for filing a suit pursuant to § 9. That part of § 33 still expressly provides that no such suit may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure or vesting, "whichever is later." The proviso attached to that sentence still tolls the running of this two-year period only if, *during such period*, a claim or suit pursuant to § 9 or § 32 (a) was pending. Pass v. McGrath, (D.C.Cir.) 192 F. (2d) 415, cert. denied, 342 U. S. 910. As before noted, no claim or suit was filed during the two-year period following vesting of the property in question on December 17, 1947.

Appellee argues, however, that, since the 1954 amendment extended the time for filing notices of claim, the tolling provision of § 33 should be read as providing that such period of limitation is tolled during the pendency of a claim if the notice of claim is filed *at any time* during the extended period provided by the 1954 amendment.

No court has sanctioned such a disregard of the express language of the last sentence of § 33. On the contrary, two district courts have rejected a like contention.[4] No court of appeals has passed upon the

[4] Pedersen v. Brownell, (D.Ore.) 129 F.Supp. 952; Grabbe v. Brownell, (E.D.N.Y.) 140 F. Supp. 4.

matter since the 1954 amendment was enacted. In the Pass case, decided in 1951, the vesting occurred in 1943. The notice of claim was filed in September, 1946, and was therefore timely. The suit was filed in October, 1949, which was after the April 30, 1949 deadline specified in the last sentence of § 33. It was contended that, since the notice of claim was timely filed and was still pending, the period of limitation for bringing suit had been tolled. It was held, however, that since the notice of claim was not filed within two years of the vesting, it could not serve to toll the period of limitation. The principle thus established is that a notice of claim may be timely, within the meaning of the first sentence of § 33, and yet fail to extend or toll the period of limitation for bringing suit.

If that could happen under § 33, as amended in 1948, it is difficult to see why, under similar facts, it could not happen under the 1954 version of the section, since no change was made in the tolling provision. Here the notice of claim was timely filed within the meaning of § 33, as amended in 1954. But it was not filed within two years of the vesting, and so could not serve to toll the period of limitation for bringing suit.

In our view, the 1954 amendment does not indicate an intention on the part of Congress to reject the construction of the tolling provision of § 33, as announced in Pass v. McGrath.

Appellee asks us to discount Pass as stating principles of statutory construction at variance with three

cases which he cites.[5] These decisions make it clear that the letter of the Trading with the Enemy Act is not to be regarded as controlling where it is plainly contrary to the spirit and policy of the legislation and to the intention of Congress. While Pass v. McGrath gave effect to the letter of the act, we do not read it as ignoring the spirit and policy of the legislation or the intention of Congress.

Turning to the case before us, we find no indication that the spirit or policy of the 1954 amendment of § 33, or the intention of Congress in enacting it, runs counter to the express provisions of the last sentence of that amended section. On the contrary, the fact that Congress chose to retain the provision of § 33 limiting the tolling of the period of limitation, after it was construed in Pass v. McGrath in the manner indicated, is some evidence of congressional satisfaction with that construction.

The argument upon which appellee seems to place greatest reliance is based upon the fact that the notices of claim referred to in the first sentence of § 33 are expressly made conditions precedent to the procedures specified in § 9 as well as § 32. Appellee contends that the administrative provisions of § 9 either have been superseded by § 32, or relate only to World War I. Hence, he argues, the only part of § 9 procedure to which notices of claim could have been pertinent when the 1954 amendment was enacted was that which re-

[5]Markham v. Cabell, 326 U.S. 404, 409; Guessefeldt v. McGrath, 342 U.S. 308, 319; Vowinckel v. First Federal Trust Co., (9 Cir.) 10 F. (2d) 19.

lates to suits. Appellee concludes from this that unless the extended period for filing such claims was intended to extend the time for filing suits, the reference to § 9 in the first sentence of § 33, as amended in 1954, is meaningless.

The premise upon which this argument is based does not, in our view, support the conclusion reached. Appellee concedes that the administrative provisions of § 9 have not been superseded by § 32, in so far as World War I claims are concerned.* It follows that the reference to § 9 in the first sentence of § 33, as amended, serves a purpose other than that relating to suits. This being the case, insistence upon the time limits for bringing suit, as specified in the last sentence of § 33, does not render meaningless the reference to § 9 in the first sentence of that section.

Appellee makes reference to the legislative history of § 33. We find, in this history, no basis for disregarding the express language of the last sentence of § 33. House Report No. 1114, 83d Congress, in which the Committee on Interstate and Foreign Commerce recommended passage of S.373, amending § 33, refers to the extension of time for filing "claims." The closest which this report comes to stating the purpose of the extension is this language: "so that persons such as

*This must be true because § 32, the only other section which provides for administrative returns, by its terms excludes its application to "any property or interest acquired by the United States prior to December 18, 1941." Section 33 does not refer to "World War I" claims or "World War II," claims, but, rather, to claims relating to property (a) acquired by the United States prior to December 18, 1941, and (b) acquired on or after December 18, 1941.

those described earlier in the report may seek the return of their property.'" Appellee argues that the word "claims" can be construed as including both administrative claims and suits. While this construction is possible, it is by no means clear that the committee used the word in that sense. In our opinion, the committee report does not indicate a plain intent to extend the time for filing suits.

There are attached to this committee report letters concerning the legislation submitted by various agencies of the government. A letter submitted by the War Claims Commission[8] indicates that the chairman of that agency probably thought the proposed extension of time would affect suit procedure under § 9. On the other hand, a letter submitted by the Department of Justice[9] indicates a contrary construction, since it refers to S.373 as a bill "to extend the time for the filing of administrative claims. . . ." Legislative history of this kind is inconclusive.

For the reasons indicated above, we conclude that the instant suit was not timely filed within the meaning of § 33, as amended in 1954.

Appellee contends that, if § 33 is so construed as to deprive him of the right to sue for the return of the vested property, it is unconstitutional as to him.

The factual basis for this argument is predicated upon the circumstance that appellee, then a medical

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[7] H. R. Rep. 1114, 83d Cong., 2d Sess. (1954), reported in 1954-2 U. S. Code Cong. & Ad. News 1997, 1998.

[8] 1954-2 U. S. Code Cong. & Ad. News 1999.

[9] Id. at 2005.

officer in the Japanese army, was a prisoner of war in Siberia at the time of the vesting, and until December 4, 1948, when he was repatriated to Japan. It was not until April 6, 1949, that appellee, then subject to regulations imposed upon an occupied country, could be said to have access to the courts of the United States.[10] Since the vesting occurred on December 17, 1947, the period of limitation for filing suit was December 16, 1949. It is argued that the eight and a half months between April 6 and December 16, 1949, is not a reasonable period of time to allow for the bringing of such a suit.

The power of Congress to provide for an immediate seizure in war times of property supposed to belong to the enemy is dependent upon adequate provision being made for its return in case of mistake. Central Trust Co. v. Garvan, 254 U. S. 554, 566. Whether adequate provision for such return has been made depends, among other things, on whether the period of limitation for the bringing of suits for return of seized property is reasonable. Appellee is therefore correct in contending that the reasonableness of the period of limitations presents a constitutional question.

We are not persuaded, however, that the reasonableness of the period, in the constitutional sense, is to be judged by the hardship or lack of hardship disclosed

[10]Regulations of the occupation authorities in Japan prohibited transmittal to the United States of "papers of legal procedure" until April 6, 1949. H. R. Rep. 1114, 83d Cong., 3d Sess. (1954), reported in 1954-2 U.S. Code Cong. & Ad. News 1997, 1998.

under the facts of a particular case. Nor is the fact that, for a period, appellee was involuntarily deprived of access to the courts because of war, a controlling consideration. This would be just another way of saying that the period of limitation is tolled by war, a contention rejected in the recent Soriano case, supra.

The period of limitation set by Congress was until April 30, 1949, or until two years after vesting, with the provision that this period would be tolled by the pendency of any claim filed during that two-year period. In our view, this was a reasonable allowance of time, and there is no constitutional reason why it should not be applied according to its terms.

Since the instant suit was not filed within the period of limitation specified in § 33, the district court was without jurisdiction to entertain the suit. Accordingly, the judgment for appellee is

Reversed.

(Endorsed:) Opinion. Filed Apr. 5, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 15,197

Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian,
Appellant,

vs.

Morizo Nakashima, etc.,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed.

(Endorsed) Judgment: Filed and entered: April 5, 1957. Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 426

MORIZO NAKASHIMA, AS EXECUTOR OF THE LAST WILL OF AKIRA MORIMOTO, DECEASED, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion in denying the respondent's motion to dismiss on the ground that the action was barred by the limitations of time prescribed by Section 33 of the Trading with the Enemy Act (R. 8-9). After a trial on the facts the District Court wrote a "Memorandum and Order," which is not reported but which appears in the record at pages 13 to 27. The opinion of the Court of Appeals, reversing the District Court on the ground that the action was barred by

Section 33, is reported at 243 F. 2d 787, and appears in the record at pages 171 to 177.

JURISDICTION

The judgment of the Court of Appeals was entered April 5, 1957 (R. 178). The petition for rehearing was denied June 7, 1957 (R. 179). The petition for a writ of certiorari was filed on September 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the provision of Section 33 of the Trading with the Enemy Act, which provides that suits under Section 9(a) to recover vested property must be instituted within two years after vesting, is so unreasonably short as to amount to a deprivation of property without due process of law, when applied to a suit brought by petitioner's decedent, who was a prisoner of war when the property was vested in 1947 and who returned to Japan in 1948 and lived there for two years thereafter.

STATUTE INVOLVED

The relevant provisions of the Trading with the Enemy Act are Sections 9(a), 32(a)(1) and (2)(D), and 33, Section 33 is reprinted in the petition for certiorari, pp. 4-5, and Sections 9(a) and 32(a)(1) and (2)(D) are reprinted in Appendix A, *infra*, pp. 9-12.

STATEMENT

Akira Morimoto, the decedent, was a dual national, born in California in 1912 of Japanese parents (R. 31). In 1924 he was taken by his parents to Japan, where he lived until 1950, except for the war years (R. 31-32, 51). He served as a medical officer with the Japanese Army in Manchuria until 1945, when he was taken prisoner

by the Russians. He was a prisoner of war in Siberia until late 1948, when he was repatriated, returning to Japan on December 4, 1948 (R. 31).

Morimoto inherited the property in question from his father in 1932 (R. 86-87, 92). The Attorney General vested the property (two lots of improved real property in Fresno, California, and accrued rentals, with a total value of about $11,500) by a vesting order which was filed with the Division of the Federal Register on December 17, 1947 (R. 29). Morimoto learned of the vesting shortly after his return to Japan in December 1948 (R. 48-49). In April 1949 he applied to the United States consulate in Yokohama for a passport (R. 49). That was the first time, so far as the record shows, that he claimed United States citizenship.

When Morimoto and his parents went to Japan in 1924, they left in the United States two older brothers, one of whom became a partner in the business the father had conducted (R. 42, 86). According to the complaint, one of these brothers learned of the vesting order of December 1947 in September 1949 (R. 5). On or about October 17, 1950, this brother, acting under a power of attorney from Morimoto, filed a notice of claim with the Office of Alien Property and brought this suit on October 23, 1950 (R. 5, 171).

Morimoto returned to the United States in December 1950, and filed an amended complaint September 28, 1951 (R. 6, 7).

The respondent moved to dismiss the action on the ground that it had not been brought within the period of time limited by Section 33 of the Trading with the Enemy Act. The District Court denied the motion (R. 8-9). After a trial the court entered judgment for the plaintiff (R. 35), finding *inter alia*, that it was not

true that the action was commenced after the time limited by Section 33 of the Act (R. 33) and that he brought the suit "as soon as he reasonably could" (R. 31-32).

The Court of Appeals reversed, holding that under Section 33 the time for bringing suit expired December 16, 1949 (R. 171-177).

ARGUMENT

The governing provision of Section 33 of the Act is that "No suit pursuant to section 9 may be instituted * * * after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian".[1] The vesting order was effective, and the property "vested", when the order was filed with the Federal Register (8 C.F.R., 1952 Revision, § 504.1; 17 F.R. 1082) on December 17, 1947. The two-year period ended December 16, 1949, and this action brought in October 1950 was thus ten months too late. The decision of the Court of Appeals is supported, therefore, by the plain language of the statute. In another recent case the Court of Appeals for the Second Circuit in *Grabbe* v. *Brownell*, decided July 30, 1957, not yet reported,[2] followed and approved the decision of the Ninth Circuit in the instant case. (The text of the Second Circuit's opinion in the *Grabbe* case is set out in Appendix B, *infra*, pp. 13-17.)

The uniform course of decisions under Section 33 is that it is to be applied according to its terms, and that a court is without jurisdiction to entertain a suit brought after the period of limitations. *Pass* v. *Mc-*

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[1] By Executive Order No. 9788 (October 14, 1946, 11 F.R. 11981) the Attorney General succeeded to the functions and authority of the Alien Property Custodian.

[2] Affirming *Grabbe* v. *Brownell*, 140 F. Supp. 4 (E.D. N.Y.).

Grath, 192 F. 2d 415 (C.A.D.C.), certiorari denied, 342 U. S. 910; *Kroch* v. *McGrath*, 192 F. 2d 416, (C.A.D.C.) certiorari denied, 342 U. S. 927; *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.); *Cisatlantic Corporation* v. *Brownell*, 222 F. 2d 957 (C.A. 2), affirming 131 F. Supp. 406 (S.D.N.Y.); *Kroll* v. *McGrath*, 91 F. Supp. 173 (D.D.C.); *Pedersen* v. *Brownell*, 129 F. Supp. 952 (D.Ore.); *First National Bank of Portland* v. *McGrath*, 97 F. Supp. 77 (D.Ore.).

As amended in 1948, and as it stood until 1954, Section 33 imposed on the filing of both claims and suits a time limit of April 30, 1949, or the expiration of two years from the date of vesting, whichever was later. In 1954, however, Congress amended the first sentence of Section 33 to extend to February 9, 1955, the time for the filing of notices of claim. Public Law No. 292, approved February 9, 1954 (68 Stat. 7). The 1954 amendment left unchanged the limitation of time on the bringing of suits, and the courts have held that Congress did not intend, when it granted additional time for the filing of administrative claims, to extend the time for suits. See *Pedersen* v. *Brownell*, 129 F. Supp. 952 (D.Ore.); *Grabbe* v. *Brownell*, 140 F. Supp. 4 (E.D. N.Y.), affirmed July 30, 1957 (C.A. 2), as well as the opinion of the Court of Appeals in the instant case (R. 173-176).

Petitioner argues that in the case of many claimants, who were under some disability or were beyond seas, or both, the period of two years for the bringing of suits was so unreasonably short as to amount to a denial of due process.

In the instant case it appears, from Morimoto's own testimony (R. 48-49), that he, though in Japan, learned

of the vesting shortly after his return to Japan in December 1948, so that he had a period of about a year in which to sue, or about eight months if one accepts his contention that regulations of the occupation authorities shut off his access to the courts of the United States until April 1949 (R. 176). That would appear to have been a sufficient period of time to enable an ordinarily diligent man to bring suit. See *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 562; *McCloskey & Co.* v. *Eckart*, 164 F. 2d 257, 260 (C.A. 5). Petitioner may not attack the constitutionality of the statute on the ground that on other facts its application might be unconstitutional.[3] *Federation of Labor* v. *McAdory*, 325 U.S. 450, 461-462; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479.

Apart from the facts of this case, it can not be said that the judgment of Congress that a period of two years after vesting was sufficient was unreasonable. Congress knew that it was legislating for the claims of many people who were in foreign countries, including prisoners of war and persons in displaced persons' camps. But displaced persons, residents of enemy countries, and residents of countries the enemy had occupied, would be, in very many cases, "enemies" within the Act and unable by virtue of that fact to sue under Section 9(a). Their remedy would be by administrative claim under Section 32, and they would not be affected by the limitation on suits. *Guessefeldt* v. *Mc-*

[3] Under the 1954 amendment Morimoto's 1950 notice of claim was timely filed. If petitioner is himself eligible for a return it would appear that the property might be returnable by administrative action under the "dual national" provisions of Section 32(a)(2)(D) (*infra*, pp. 10-12) if return is found to be in the national interest.

Grath, 342 U.S. 308, 314-315. A two-year statute of limitations is not uncommon (see, for example, Federal Rules of Civil Procedure, Rule 25(a)), and, under Section 33, the person whose property was vested could stop the running of the two-year period merely by filing a notice of claim. *First National Bank of Portland* v. *McGrath*, 97 F. Supp. 77 (D.Ore.). Statutes of limitation are of necessity practical and rigid, and shut off all untimely claims, meritorious and otherwise, *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314; *Kavanagh* v. *Noble*, 332 U.S. 535, 539. There is no constitutional requirement that in a statute of limitations Congress must provide exceptions for prisoners of war and persons beyond seas,[1] any more than for infants. See *Vance* v. *Vance*, 108 U.S. 514. Petitioner's contention would amount to reading into Section 33 an exception based on wartime conditions. A similar contention has very recently been rejected by this Court. *Soriano* v. *United States*, 352 U.S. 270. Balancing, as Congress had a right to do, the interest in a prompt termination of alien property litigation against the interests of such claimants who might not be "enemies" and who might be in enemy countries, the imposition of a two-year limitation on suits can not be said to have been so unreasonable as to amount to a denial of fair treatment, certainly as applied to the facts of this case.

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[1] There is no question of a repeal by implication of Section 2401, 28 U.S.C. Although a suit under Section 9(a) is in substance a suit against the United States, the defendant is the Attorney-General and Section 2401 would seem not to apply. When Congress first enacted Section 33 in 1946 it did so on the understanding that there was no statute of limitations applicable to suits under Section 9(a). S. Rep. No. 1839, 79th Cong., 2d Sess., p. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
DALLAS S. TOWNSEND,
Assistant Attorney General.
GEORGE B. SEARLS,
Attorney.

OCTOBER, 1957.

APPENDIX A

Trading with the Enemy Act, as amended
(40 Stat. 411, 50 U.S.C., App. 1, *et seq.*)

Sec. 9(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United

States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * * *

SEC. 32 (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately

prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: *And provided further*, That, notwithstanding the provisions of subdivision (C) hereof and of this subdivision (D), return may be made to an individual who at all times since December 7, 1941, was a citizen of the United States, or to an individual who, having lost United States citizenship solely by reason of marriage to a citizen or subject of a foreign country, reacquired such citizenship prior to the date of enactment of this

proviso if such individual would have been a citizen of the United States at all times since December 7, 1941, but for such marriage: *And provided further,* That the aggregate book value of returns made pursuant to the foregoing proviso shall not exceed $9,000,000; and any return under such proviso may be made if the book value of any such return, taken together with the aggregate book value of returns already made under such proviso does not exceed $9,000,000; and for the purposes of this proviso the term "book value" means the value, as of the time of vesting, entered on the books of the Alien Property Custodian for the purpose of accounting for the property or interest involved; * * *

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APPENDIX B

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 339—October Term, 1956

(Argued April 12, 1957 Decided July 30, 1957)

Docket No. 24474

XENIA GRABBE AND OLGA GAYDEBOUROFF,
PLAINTIFFS-APPELLANTS,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, DEFENDANT-APPELLEE

BEFORE:

MEDINA and WATERMAN, *Circuit Judges*, and LEIBELL, *District Judge*.

Plaintiffs appeal from decision below, D.C., E.D., N.Y., Rayfiel, *J.*, reported at 140 F. Supp. 4, dismissing their action for lack of jurisdiction. Affirmed.

WATERMAN, *Circuit Judge*:

The appellants, Xenia Grabbe and Olga Gaydebouroff, appeal from an order granting defendant's motion to dismiss their complaint on the ground that the District Court lacked jurisdiction over the subject matter of the action. The opinion below is reported at 140 F. Supp. 4 (1956).

Appellants sued to recover property vested by the Alien Property Custodian by a vesting order dated August 21, 1944, and filed with the Federal Register on September 1, 1944. See 9 Fed. Reg. 10790 (1944). The vested property comprised ten shares of capital stock of a New York corporation, bequeathed to the

appellants under the will of one Katherine Johnson Ashe. The corporation was subsequently liquidated, and the proceeds of the ten vested shares, totaling slightly less than $15,000, were paid to the appellee, the Attorney General of the United States. The complaint further alleged that at the time of vesting the appellants were stateless infants, aged fourteen and twelve respectively, and that they were not voluntarily residents of an enemy country within the mean [sic] of the Trading with the Enemy Act, 50 U.S.C.A. App. §§ 1-40.

On June 16, 1952, the appellants filed a notice of claim to the property in question with the Attorney General. This action was not instituted, however, until December 12, 1955. The District Court dismissed the complaint on the ground that the suit was barred by section 33 of the Trading with the Enemy Act, 50 U.S.C.A. App. § 33 (Supp. 1954),[1] the applicable statute of limitations.

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[1] That section provides:

No return may be made pursuant to section 9 or 32 [section 9 or 32 of this Appendix] unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to successor organizations designated pursuant to section 32(h) of this Appendix if notice of claim is filed before the expiration of one year from August 23, 1954. No suit pursuant to section 9 [section 9 of this Appendix] may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof [section 9 or 32(a) of this Appendix].

The appellants were legally admitted to this country in July 1950 and September 1951, respectively. They assert that they did not learn of the defendant's seizure of their legacies until sometime after their arrival. At the time the appellants first filed a claim with the Attorney General for the return of the seized property—June 16, 1952—they were barred by the then existing applicable statute of limitations from either filing a claim or from instituting a judicial action. However, on February 9, 1954, section 33 of the Trading with the Enemy Act was amended so as to extend the available period in which to file a claim, thereby rendering the plaintiffs' claim for administrative relief timely. But this 1954 amendment did not expressly confer upon claimants any new right to sue the United States, nor did it extend the time previously provided for bringing suits to recover vested property. Both before and after amendment, section 33 contained the following provision:

> "No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof."

Since the property here in issue was vested in 1944, and since no suit or claim by the appellants was pending prior to 1952, it is clear from the express language of section 33 that a judicial remedy was no longer available to them in 1955. The appellants attempt to avoid the clear and unambiguous language of section 33 by citing the broad congressional purpose behind

the 1954 amendment, which was designed to give many people an extended opportunity to recover property that had been vested by the United States. See H. Rep. No. 1114, 83d Cong. 2d Sess. (1954); S. Rep. No. 615, 83d Cong., 2d Sess. (1954). But their contentions, along with several other ingenious arguments, were recently rejected by the Court of Appeals for the Ninth Circuit in its able opinion in *Brownell* v. *Nakashima*, 243 F. 2d 787 (9 Cir. 1957), where the plaintiffs also sought to escape the impact of section 33. See also *Pedersen* v. *Brownell*, 129 F. Supp. 952 (D. Ore. 1955). Cf. *Pass* v. *McGrath*, 192 F. 2d 415 (D. C. Cir.), *cert. denied*, 342 U.S. 910 (1952); *Cisatlantic Corp.* v. *Brownell*, 131 F. Supp. 406 (S. D. N. Y., 1953), *aff'd* 222 F. 2d 957 (2 Cir. 1955). We adopt the reasoning of the *Nakashima* decision.

Nor do we think that we should ignore the clear mandate of this statute because of an alleged inconsistency in the decision of Congress extending the time during which individuals may seek to recover their property by filing a claim for relief with the Attorney General, while leaving unchanged the period in which judicial relief may be sought in the federal courts. The varying considerations distinguishing administrative remedies from judicial remedies may well have been thought by Congress sufficient to warrant substantially different statutes of limitations governing these two separate courses to the recovery of vested property.

The appellants also argue that the general statutory limitation of six years for civil actions against the United States, embodied in 28 U.S.C.A. § 2401(a), should apply to this suit, and that their right of action first accrued in 1954 at the time of the enactment of amended section 33. Even assuming, *arguendo*, that appellants' claim first arose in 1954, we cannot apply a general statute of limitations to a class of claims for

which Congress has provided a specific statute fixing the time within which suit may be brought. *Cf. United States* v. *A. S. Kreider Co.*, 313 U.S. 443, 447 (1941).

The personal hardship that may be involved here is not relevant to the question of statutory construction before us. To the contrary, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

The plaintiffs' efforts to attack the constitutionality of section 33 do not warrant discussion. Again, for a complete answer, we advert to the reasoned opinion of our brethren of the Ninth Circuit in *Brownell* v. *Nakashima*, 243 F. 2d 787, 792 (9 Cir. 1957).

Order affirmed.